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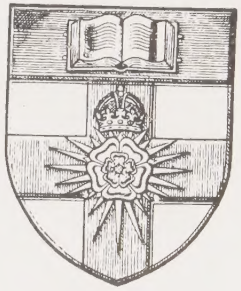

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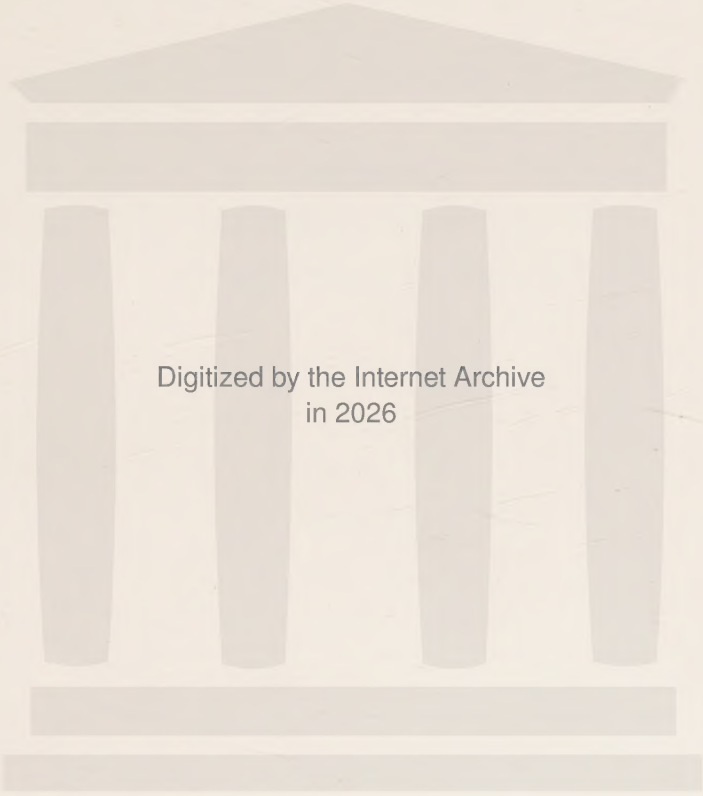
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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

MAY 11, 1925, TO DECEMBER 20, 1926.

EDITED BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

WILLIAM HORNE WINN.

1925
11 *May.*

Habitual criminal.

The direction on the allegation of being a habitual criminal must explain the merits of an interval of honest work in each case.

The essential question is whether the prisoner is a habitual criminal at the time when he is so charged.

Appeal against sentence.

Appellant was convicted on April 6th, 1925, before the Chairman at Cheshire (Knutsford) Sessions of housebreaking, and was sentenced to three years' penal servitude. He was also convicted of being a habitual criminal, and was sentenced to five years' preventive detention.

Appellant was not present.

The prosecution was not represented by counsel.

The LORD CHIEF JUSTICE, having said that no objection could be taken to the sentence of penal servitude, continued:—The appellant was released after serving the sentence for the offence committed by him which immediately preceded the substantive offence in the present case on January 18th, 1924. Very improperly, as has been often pointed out, he was arrested at the prison gates on a warrant on a maintenance order, and was sentenced to two months' imprisonment. Save, however, for that two months, he worked at a mill from January 18th to October 10th, 1924. He than left because of taunts from his fellow-workmen, who heard of his imprisonment. He committed his last offence on January 30th, 1925. The significance of the period of work was not made clear in the summing-up, in which there were passages suggesting that the jury might convict because

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11 *May.*

WILLIAM HORNE WINN.

Hewart L.C.J.

there had been a period in the appellant's career when it would have been true to say that he was a habitual criminal. But that was not the question. The question was whether it was true to say that he was a habitual criminal at the time when he was so charged. It is impossible to say that the jury would inevitably have found the appellant to be a habitual criminal if the importance of his period of honest work had been explained, and the sentence of preventive detention must, therefore, be quashed.

Sentence of preventive detention quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER, AND MR. JUSTICE GREER.

---

18 *May.*

JOSEPH DONOVAN.

Before an admission of being a habitual criminal is accepted, it should be made clear to the prisoner that the allegation is that he was a habitual criminal at the time of his arrest.

Appeal against sentence and application for leave to appeal against conviction as habitual criminal.

Appellant was convicted on April 20th, 1925, before the Assistant-Recorder at Leeds City Sessions, of stealing a purse and some money from the person, and was sentenced to three years' penal servitude. He then admitted that he was a habitual criminal and was sentenced to five years' preventive detention.

Appellant in person.

The Crown was not represented by counsel.

The LORD CHIEF JUSTICE: If it clearly appeared that the sentence of three years' penal servitude passed on the appellant was

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18 *May.*

JOSEPH DONOVAN.

Hewart L.C.J.

passed not because it was the proper penalty for the offence of which he was then convicted, but because it was a necessary condition precedent to a sentence of preventive detention, it could not be upheld. The provision in the Prevention of Crime Act, 1908, s. 10, sub-s. 1, that the Court shall have power to pass a sentence of preventive detention in addition to a sentence of penal servitude does not mean that a sentence of penal servitude may be passed merely to lead to a sentence of preventive detention. The provision in the statute is in the interests of defendants, and it means that a sentence of preventive detention shall not be passed unless the substantive offence of which the defendant has just then been convicted is of such gravity as in itself to call for a sentence of penal servitude. Since 1881 the appellant has been convicted on thirty occasions, principally for crimes of dishonesty. In 1917 he was found to be a habitual criminal. In view of that record it is impossible to say that a sentence of penal servitude for the pocket-picking in the present case was not warranted. One thing must be added. The appellant admitted that he was a habitual criminal. He was not so found by a jury. He seems to have had no little experience of habitual criminality, but it is right that, before a Court accepts a plea of guilty to such a charge, the essence of that charge—namely, that the prisoner *at that time is* (not that at some other time he might have been regarded as) a habitual criminal—should be explained to him. In the present case the appellant might most properly have made the same admission if the explanation had been given to him, and it is not possible, therefore, to say that the sentence of preventive detention ought not to have been passed on him.

Appeal dismissed.

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18 *May.*

Hewart L.C.J.
Salter J.
Greer J.

GEORGE WHEATLEY TYREMAN.

There ought not to be two indictments when all charges may be preferred in one.

Nothing must be stated in the presence of jurors about the allegation of being a habitual criminal until the primary charge is disposed of.

When a conviction as a habitual criminal has been remitted in view of the opinion of this Court, it ought not to be alleged against the prisoner on a subsequent trial.

On the issue whether the prisoner has been leading an honest life, no evidence is admissible of periods or of facts which have not been set out in the Statutory Notice.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

Appellant was convicted on April 20th, 1925, before the Recorder at Leeds City Sessions, of housebreaking, and was sentenced to two concurrent sentences of five years' penal servitude. He was also found to be a habitual criminal and was sentenced to five years' preventive detention.

Appellant in person.

T. P. Perks for the Crown.

The Lord Chief Justice (*a*): This appellant, George Wheatley Tyreman, was convicted at the Leeds City Sessions before the learned Recorder upon two indictments for housebreaking, and the jury also found that he was a habitual criminal, and in the result he was sentenced to five years' penal servitude and five years' preventive detention. He now appeals against sentence and applies for leave to appeal against both the conviction for housebreaking and the finding that he was a habitual criminal. For some reason, which is not clear, there were two indictments in this case. There might well have been only one; the charges are founded on the same facts or are part of a series of offences of the same or a similar character within Rule 3, s. 4, of the Indictments Act, 1915. Both of those indictments contained a charge that the appellant is a habitual criminal, and although the appellant pleaded not guilty in each of the two cases of house-

(*a*) This judgment is printed from the transcript of a shorthand note supplied by the courtesy of the Director of Public Prosecutions.

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18 *May.*

GEORGE WHEATLEY TYREMAN.

Hewart L.C.J.

breaking, it is clear from the transcript that he was at once arraigned upon the charge of being a habitual criminal. That is contrary to the provisions of s. 10, sub-s. 4, of the Prevention of Crime Act, 1908. It appears, however, that the trial upon the indictment took place upon the day after that on which these pleas were taken, and in any case the evidence in the housebreaking cases was so clear that it could not successfully be contended that there was any miscarriage of justice involved in the conviction.

It cannot, however, be too clearly understood that where a man is charged with a substantive offence and there is also a charge that he is a habitual criminal nothing ought to be stated in the presence of jurors about the charge that he is a habitual criminal until the substantive offence has been dealt with. With regard to these two indictments the facts of the first case were shortly these:—On the 28th March last Mr. Gill left his house at 26, Westbury Grove, empty—I mention the address for a reason which will presently appear. At a few minutes after 8 o'clock a woman spoke to two men, Burrow and Beckingshaw, and they went to Mr. Gill's house, Burrow to the front door, and noticed that the lock had been burst open and part of the door was broken; Beckingshaw went to the back door of the house, and after a few minutes the appellant came out of the front door. Burrow caught hold of him, there was a struggle, and the appellant called out for help: "Charlie, come and help me, they have got me." The house was examined, however, and nobody else was found in it. The appellant was taken by tramcar, was given into custody, and at the police station a table napkin ring and a compass, identified by Mr. Gill, were found upon the appellant. He was charged and he made no reply. At the trial he made a statement to the jury in which he put forward three competing defences, first, that he found the things in the road; secondly, that it might be that he had stepped into the doorway of the house; and, thirdly that he was rather under the influence of drink. The jury convicted him. The second indictment related to another occurrence on the same night. Between 6 o'clock and a quarter to 9 another house in Westbury Grove, one or two houses away from Mr. Gill's house, was burst open after the owner had left it apparently secure, and when the appellant was searched at the police station a small cash-box, a razor and a match-box were found in his possession which were the property of the occupant of that

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18 *May.*

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Hewart L.C.J.

house. Another cash-box which had contained £10 had been brought empty to the occupant of that house by a stranger. The appellant was charged with stealing that also, and when he was charged he said "£10! there was not ten pence." In that case also the jury convicted, and it is not possible to say that there is any ground at all for interfering with these convictions.

With regard to the "habitual criminal" charge, the case is somewhat different. The Statutory Notice in this case contained two grounds: first, "That you have on two occasions been convicted as a habitual criminal and sentenced to preventive detention," and there follow particulars of those two findings or convictions, namely, the first on the 20th October, 1912—that is now thirteen years ago—and the second on the 13th April, 1922. The date in the first case is not without importance. With regard to the second of those convictions or findings, it is to be observed that that case was one of the considerable number of cases referred in August last to this Court under s. 19 (B) of the statute for the opinion of the Court after the judgment in *The King* v. *Norman*, 1924, 2 K. B. 315; [18 Cr. App. R. 81]; and in the appellant's case, as in the case of a few others, the opinion was expressed that the further term of preventive detention should be remitted, and it was remitted accordingly. Nevertheless, that second finding appeared as a ground in the Statutory Notice. The second ground in the notice was "That you are leading persistently a dishonest or criminal life," and particulars follow. When the came came to be tried evidence was given of each of the two findings or convictions under the statute relating to habitual criminals, and it does not appear to have been known either to the learned Recorder or to the jury that the second sentence of preventive detention was remitted on the 23rd August, 1924 [18 Cr. App. R. 119]. Some reference to the matter of a quite insufficient kind appears to have been made when the jury were actually considering their verdict. Now the police officer who gave this evidence was asked what the appellant had been doing between the years 1918 and 1921, and he replied that the appellant was not working. There was no allegation in the Statutory Notice that the appellant did not do any work between 1918 and 1921, and it is, to say the least, doubtful whether that evidence was admissible. The inspector went on to say that the appellant did six days' work as a painter from the 18th to the 24th September and left that work without giving any

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18 *May.*

GEORGE WHEATLEY TYREMAN.

Hewart L.C.J.

explanation of the cause of his leaving it. That also is not stated in the Statutory Notice. Again, a police officer said that on the 28th March he found a housebreaking tool, a 12 in. chisel, at the back of 26, Westbury Grove, that is to say, the first of the two houses mentioned—Mr. Gill's house. Here the legal objection was taken by the appellant himself. He said that he had never seen the chisel until that day in Court, and, he added, there is nothing about it in the paper or in the list. The appellant did not go into the witness-box, but he said that he could call witnesses to prove that he did not leave his work in September last willingly, but that he was given notice to leave, and it may well be that if that allegation made in Court in the presence of the jury had been contained in the Statutory Notice, witnesses would have been called upon that point. When one looks at the second finding that this man was a habitual criminal, no doubt it is correct literally to say that he was so found. But afterwards the sentence of preventive detention so far as it was unexpired was remitted, and it was remitted upon the ground that it was not certain that if the summing-up had been what it should have been as was decided in *Norman's* case, the jury would have found the prisoner to be a habitual criminal at the time stated. It is quite clear that it is desirable that steps should be taken with regard to the other cases falling in the same category to prevent that from happening which has happened in this case. Here the jury were invited to find that this man was a habitual criminal without knowing what had happened about the previous finding in 1922 that he was a habitual criminal, and having been told, although there was nothing in the notice to that effect, that from 1918 to 1921 the appellant had not done any work—a statement which he denied. In those circumstances it is not possible to say that this sentence of preventive detention is satisfactory, and while the appeal against the conviction and sentence for housebreaking is dismissed, and, therefore, the sentence of five years' penal servitude stands, the sentence of preventive detention is quashed. To that extent the appeal succeeds.

Conviction as habitual criminal quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE FRASER.

1925
9 & 10 *Feb.*

PERCY BATEMAN.

To support an indictment for manslaughter by negligence the prosecution must prove (1) *a duty to take care,* (2) *failure to discharge that duty, and* (3) *that the death was due to that default, and, further, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.*

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on December 9th, 1924, before Shearman, J., at the Central Criminal Court, of manslaughter, and was sentenced to six months' imprisonment in the second division.

Norman Birkett, K.C., and *Arthur Davis* (with them *Sir E. Marshall Hall, K.C.*) for the appellant, who was present. Appellant is a doctor, practising at Deptford. On July 23rd, 1924, he was called in to attend a woman named Harding, the wife of a labourer, who was about to be confined. The delivery of the child was difficult, and after an hour's treatment it was born dead. The prosecution alleged that appellant was criminally negligent in his treatment during the delivery and in the removal of the afterbirth, with which a part of the uterus was brought away. Appellant thought it wiser not to move Mrs. Harding to the infirmary, but on July 28th she was so ill that he ordered her to be moved, and she died there on July 30th. [The rest of the facts appear sufficiently in the judgment.] It is submitted that the judge misdirected the jury on the law and on the evidence and wrongfully admitted evidence, and that the verdict was against the weight of evidence. The summing-up might have been unexceptionable in a civil action against appellant for damages for negligence, but it contained no direction on or definition of criminal negligence. Appellant had admittedly acted to the best of

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9 & 10 *Feb.*

PERCY BATEMAN.

Hewart L.C.J.
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Fraser J.

his ability, and eminent medical evidence was given at the trial approving of what he did. In those circumstances a conviction of the appellant of a criminal offence cannot stand. Where a doctor honestly exercises his best skill to cure a patient, but the patient dies, the doctor is not guilty of manslaughter: *Van Butchell,* 3 C. & P. 629: 1829. On the same facts as those of the present case, a man midwife was acquitted after Lord Ellenborough C.J., had directed the jury that, to substantiate the charge of manslaughter, the prosecution must prove the prisoner to have been "guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention": *Williamson,* 3 C. & P. 635: 1807. The test is whether the practitioner used competent skill (*Spiller,* 5 C. & P. 333: 1832), and appellant clearly did so here in view of the expert medical evidence.

Roome for the Crown. There was evidence on which the jury could properly find appellant guilty of criminal negligence, and, therefore, of manslaughter.

The LORD CHIEF JUSTICE: The Court is of opinion that this appeal should be allowed and the conviction of the appellant quashed. In view of the importance of some of the questions raised the Court will deliver judgment at a later date.

G. B.

25 *May.*

May 25.—The LORD CHIEF JUSTICE read the following judgment:—The appellant was convicted at the Central Criminal Court before Mr. Justice Shearman of manslaughter, and was sentenced to six months' imprisonment in the second division. He appealed by leave against conviction and sentence. This Court, after hearing arguments of counsel, quashed the conviction, and intimated that a considered judgment would be delivered at a later date.

The appellant, who is a qualified medical practitioner, was indicted for having on July 30th, 1924, unlawfully killed one Mary Ann Harding. He was called in by the midwife on the night of July 23rd, and found a very unusual and difficult presentation. He administered chloroform and attempted unsuccessfully to effect delivery by the use of instruments. No blame was

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25 *May.*

PERCY BATEMAN.

Hewart L.C.J.

imputed to the appellant on that account. He then proceeded by using his hands to perform the operation known as "version," using, of necessity, considerable force. He worked at this operation for an hour and then delivered the child, which was dead. In removing the placenta, he, by mistake, removed along with it a portion of the uterus. The patient was much exhausted, and the appellant did not expect her to live. He visited her twice daily until the 28th. Although requested by the husband and the midwife to have her removed to the infirmary, he did not remove her until the 28th, on which day he wrote a letter to the superintendent that was alleged by the prosecution to be uncandid. On admission to the infirmary she was found unfit to undergo an operation. She grew gradually weaker, and died on the 30th. On a *post mortem* examination the bladder was found to be ruptured, the colon was crushed against the sacral promontory, there was a small rupture of the rectum, and the uterus was almost entirely gone.

The charges of negligence made against the appellant were, in substance, (1) causing the internal ruptures in performing the operation of "version," (2) removing part of the uterus along with the placenta, (3) delay in sending the patient to the infirmary. For the defence it was contended that (1) and (2) were, in the difficult circumstances of the case, not inconsistent with a fair degree of care and competence, and that to have moved the patient at an earlier date would only have accelerated her death. At the hearing of the appeal, counsel for the appellant relied mainly on the following grounds:—Misdirection in law, misdirection and non-direction on the facts and that the verdict was against the weight of the evidence.

Before we deal with the directions of the learned judge to the jury, it may be well to consider generally the law on this subject. In expounding the law to juries on the trial of indictments for manslaughter by negligence, judges have often referred to the distinction between civil and criminal liability for death by negligence. The law of criminal liability for negligence is conveniently explained in that way. If A. has caused the death of B. by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A. owed a duty to B. to take care, that that duty was not discharged, and that the default caused the death of B. To convict

A. of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A.'s negligence amounted to a crime. In the civil action, if it is proved that A. fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In a criminal Court, on the contrary, the amount and degree of negligence are the determining question. There must be *mens rea*. The difference between negligence and gross negligence is illustrated by the case of *Cashill* v. *Wright*, 6 E. & B. 891: 1856, which was an action against an innkeeper for damages for the loss of the plaintiff's property stolen from him while he was staying at the defendant's inn. The defendant contended that the loss had been occasioned or contributed to by the negligence of the plaintiff. At the trial the jury were directed that the defence failed unless they thought that the plaintiff had been guilty of gross negligence. On a rule for a new trial, Erle J., delivering the considered judgment of the Court (Campbell C.J., Wightman, Erle and Crompton JJ.), said: "The other question was as to the alleged misdirection, in the direction to the jury that there must be gross negligence, to maintain the defence. It does not appear that there was any information given to the jury what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, in the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction on the degree of negligence might not have been objectionable; but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*." The rule was made absolute.

In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable," "criminal," "gross," "wicked," "clear," "complete." But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between

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subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

It remains to consider the application of this principle to cases like the present where death has been caused, in the exercise of his calling, by the alleged negligence of a person professing special knowledge and skill, and a charge of manslaughter is preferred. The following cases may be cited as illustrating the language in which criminal negligence of this kind has been discussed and explained by judges in modern times: Hale's Pleas of the Crown, 429; *Williamson*, above; *Ferguson*, 1 Lewin's Criminal Cases, 181: 1830; *Long*, 4 C. & P. 423: 1831; *Spiller*, above; *Webb*, 1 Moo. & Rob. 405: 1834; *Spilling*, 2 Moo. & Rob. 107: 1838; *Whitehead*, 3 C. & K. 202: 1848; *Crick*, 1 F. & F. 519: 1859; *Crook*, 1 F. & F. 521: 1859; *Bull*, 2 F. & F. 201: 1860; *Markuss*, 4 F. & F. 353: 1864; *Noakes*, 4 F. & F. 920: 1866; *Chamberlain*, 10 Cox, 486: 1867; *Spencer*, 10 Cox, 525: 1867; *Finney*, 12 Cox, 625: 1874; *Nicholls*, 13 Cox, 75: 1875; *Doherty*, 16 Cox, 306: 1887.

The law as laid down in these cases may be thus summarised: If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. It is for the judge to direct the jury what standard to apply and for the jury to say whether that standard has been reached. The jury should not exact the highest, or a very high, standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned. If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to show that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance, if the patient has been killed by his gross ignorance and unskilfulness. No further observation need be made with regard to

cases where the death is alleged to have been caused by indolence or carelessness. As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man. As regards cases of alleged recklessness, juries are likely to distinguish between the qualified and the unqualified man. There may be recklessness in undertaking the treatment and recklessness in the conduct of it. It is, no doubt, conceivable that a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers, or for making his patient the subject of reckless experiment. Such cases are likely to be rare. In the case of the quack, where the treatment has been proved to be incompetent and to have caused the patient's death, juries are not likely to hesitate in finding liability on the ground that the defendant undertook, and continued to treat, a case involving the gravest risk to his patient, when he knew he was not competent to deal with it, or would have known if he had paid any proper regard to the life and safety of his patient.

The foregoing observations deal with civil liability. To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

We have now to deal with the alleged misdirection. At the outset of the summing-up the learned judge directed the jury as follows:—"I want first of all to explain the law to you. The law is that anybody that causes the death of anybody else—it does not only apply to a doctor, it applies to motor drivers, railwaymen or signalmen, it applies to a number of people—anybody causing the death of anybody else is criminally responsible. It is equally clear law that no one is criminally responsible for what I call making a mere mistake, and it is really for the jury to draw the line between what is called making a mere mistake, an error of judgment, and doing something which is grossly and palpably wrong. I have only one objection to make to the law as put before you by counsel for the defence, that the man is bound to make the

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best of such skill as he has. That is not quite accurate. A medical man who practices for profit—the medical profession professes skill—does not come and say, 'I am an unskilled person'—he is engaged and professes skill. Of course, you will understand it is not for every humble man of the profession to have all that great skill of the great men in Harley Street, but, on the other hand, they are not allowed to practise medicine in this country unless they have acquired a certain amount of skill. They are bound to show a reasonable amount of skill according to the circumstances of the case and you have to judge them on the basis that they are skilled men, but not necessarily so skilled as more skilful men in the profession; and you can only convict them criminally if in your judgment they fall below the standard of skill which is the least qualification which any doctor should have. You should only convict a doctor of causing a death by negligence if you think he did something which no reasonably skilled doctor should have done."

The learned judge then quoted the language used by Tindal C.J., in *Ferguson*, above, and continued: "You have got to consider if this man, in anything he did, fell below the level which you expect of a doctor—below the degree of skill which you think you have the right to expect of a doctor—by no means the extreme skill everybody knows of, but that degree of skill which you expect from a doctor who attends an *accouchement* and who is taken to know his business." In the course of his review of the evidence the learned judge referred to the law in the following passages:—"That is the whole of the evidence with regard to what is called the first part of the case. It is said that this man so treated her that by his treatment he committed all these injuries, he ruptured the womb, he ruptured her bladder in pushing about; and he caused the injuries to her intestines; and in the same way it is said that when he came to pull out the placenta, instead of pulling the placenta out of the womb, he caught hold of, not the placenta, but some tear or slit in the torn womb, and with a tug—the expression was 'a sharp pull' he pulled it away. It is said by the Crown that that shows that in doing this, and in pulling out the womb, he was guilty of gross negligence. It is said on behalf of the defence—and they called eminent surgeons—well, the nurse saw nothing wrong with the way he treated her, although the force was used and necessary, and it was unfortunate. It is said there

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was no gross negligence, and it is for you, if you feel any doubt, to see that the prisoner gets the benefit of the doubt. But are you satisfied on that that there was gross negligence? The doctors for the defence say this: they say, 'Oh, it is quite reasonable to mistake a tear in the womb for the placenta.' That is entirely a matter for you, and it is a view not entirely accepted by the doctors called for the prosecution, although they agree in cross-examination that, after all this working, a portion of the womb might be torn, but a reasonably skilful man might know the difference between pulling a womb and something that might be adherent to the inside, and the prosecution call attention to the fact of the steady outflow of blood and say that in pulling out the womb he was guilty of gross negligence, and the defence say it was a very natural mistake in the circumstances of the case. . . . The Crown first of all say there was gross negligence (and you will not find it unless you are quite satisfied of it) in pulling away the womb at all—in what he did before and in pulling it away. It is suggested by the defence—nothing of the sort, at most and at worst it was a very difficult case, and at most and at worst it was a mistake, and we say it was not negligence; it was the sort of thing that might have happened in this remarkable case. . . . Passing away from that and summing-up the first case, if you think that you are quite satisfied that it was his treatment in tearing away the womb—previous to, and up to, tearing away the womb—you will convict him; if you are not satisfied and think that there was no negligence at all, or if you have a reasonable doubt whether there was gross and culpable negligence up to that point, you will acquit him. . . . That, substantially, is the case for the Crown on the second part of the case, and they say, substantially, he was guilty of grave, wicked neglect and culpable neglect of duty in not taking some steps to remedy what has been done by his own fault or, if you do not think it was gross negligence, they say he ought to have done something to try and save the woman's life, but he did not do anything because he wished to save his reputation. . . . These are the historical facts. Do you think, assuming you are satisfied by the prosecution, that in pulling away the womb at all, and the acts preceding that, he was guilty of gross negligence and culpable negligence in causing her death? Then you come to the second head: Was he guilty of gross or culpable negligence in accelerating this woman's death by so neglecting her from the time

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that he knew her uterus had been removed. If you are satisfied that the woman wanted treatment and from the history of the case, if she had had some treatment, her life would have been prolonged, you will find him guilty; if you have any doubt about it you will find him not guilty. I will remind you of what I have said to you at the outset, that you have to be satisfied, not only that he was guilty of gross and culpable negligence, but that he caused or accelerated her death. . . . That is the whole of the case. If you are satisfied that either in the way he delivered the child or in the way he acted afterwards he acted with gross negligence and thereby caused her death, you will find him guilty; if you are not satisfied, you must acquit him on that part of the case. If you think after the womb had come away his conduct and neglect of her substantially accelerated the date of her death—if you are quite satisfied of that you will convict him on that part of the case. If you feel any reasonable doubt on either theory you will give him the benefit of the doubt and acquit him."

If the words "gross," "wicked" and "culpable" are put aside, this summing-up amounts to a direction to the jury that they must draw the line between mistake or error of judgment on the one hand, and carelessness or incompetence on the other hand. If there was only mistake or error of judgment there is no liability, but if there was any falling short of a fair average degree of care or competence, then there is liability. Such a direction would be complete and accurate on the trial of an action for damages for negligence. It is not adequate on the trial of an indictment for manslaughter. There is, however, in the passages dealing with the evidence, a frequent use of some of the adjectives which have always been used in explaining criminal negligence to a jury. For this reason, looking at the summing-up as a whole, this Court is of the opinion that there was no misdirection. It is, nevertheless, most desirable that in trials for manslaughter by negligence it should be impressed on the jury that the issue they have to try is not negligence or no negligence, but felony or no felony. It is desirable that, as far as possible, the explanation of criminal negligence to a jury should not be a mere question of epithets. It is, in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.

The learned judge was invited to withdraw the first and second

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charges of negligence from the jury on the ground that there was no evidence to support them. He declined to do so, and left all three to the jury with the instruction that they could convict on all or any of them. The jury returned a general verdict of guilty. In the opinion of this Court there was no evidence to support the first charge, based on the manner in which the accused performed the operation of "version." A strong defence was presented on the third charge, and it may well be that the jury relied largely on the first and second charges. If the first had been withdrawn from them, it is impossible to say that they would certainly have convicted. For this reason the conviction cannot stand.

Conviction quashed.

Solicitors for the Appellant—*Amery, Parkes & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE GREER.

GEORGE BOURNE.
JOHN HENRY COLEMAN.

Severity of sentence.

Appeals against sentence.

Appellants were convicted on April 8th, 1925, before the Chairman, at Monmouthshire (Usk) Sessions, of housebreaking, and were sentenced, Bourne to three years' penal servitude, and Coleman to five years' penal servitude.

G. B. McClure for appellants, who were present. Appellants were two of four men who pleaded guilty to breaking and entering a shop at Newport and stealing jewellery. There is some reason to suppose that the Chairman of the Sessions thought that, because appellants had been previously sent to penal servitude, it was incumbent on him to pass a fresh sentence of penal servitude on

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them. Bourne is a motor driver, forty-four years of age, who has been employed for thirteen years in London. In 1899 he was sentenced to three months' imprisonment for warehouse-breaking; in 1913 he was bound over for warehouse-breaking; and in 1914 he was sentenced to nine months' and three months' imprisonment (consecutive) for warehouse-breaking and breach of recognisance. He had a good Army record and was discharged in 1919. He worked for two years, but in 1921 he was sentenced to three years' penal servitude for receiving stolen property. On his release he worked for thirteen months, until December, 1924, when he was dismissed through slackness of trade. The present offence was committed in February, 1925. [He was stopped.]

The Crown was not represented.

The LORD CHIEF JUSTICE: It seems clear that these sentences were passed without sufficient regard to the record of the appellants as a whole. Both men have good Army characters. It is urged on behalf of the appellants that too little attention was paid to their efforts to get honest work and to the long periods during which they successfully resisted the temptation to commit crime. There seems to be substance in those contentions, and, although the offence to which the appellants pleaded guilty was undoubtedly a serious offence, this Court is of opinion that each of these sentences may properly be reduced to eighteen months' imprisonment with hard labour.

Sentences reduced.

Solicitor—*J. A. Davis.*

G. B.

JAMES DENT.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on April 22nd, 1925, before the Deputy-Chairman, at the County of London Sessions, of larceny, and was sentenced to three years' penal servitude.

The appellant in person.

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The Crown was not represented.

THE LORD CHIEF JUSTICE: The appellant was convicted of stealing and receiving a hamper containing gloves. In view of his youth and the fact that hitherto he has not received any sentence exceeding ten months' imprisonment, although he has been convicted several times, the Court is of opinion that his sentence may properly be reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

G. B.

WILLIAM WRIGHT.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on April 21st, 1925, before the Deputy-Chairman, at the County of London Sessions, of larceny from the person, and was sentenced to eighteen months' imprisonment.

G. D. Nokes for the appellant, who was present. This is the first term of imprisonment to which appellant has been sentenced, although in 1921 he was bound over for larceny from the person, and in 1923 he was fined £15 for loitering. According to the police evidence, appellant gets into bad company and he committed this crime while he was in such company. [He was stopped.]

THE LORD CHIEF JUSTICE: The case against the appellant was that he and two other men were engaged in stealing from the person on a tramcar. Although there may be something behind this matter that does not appear on the surface of the papers, the Court is of opinion that this sentence should be reduced to nine months' imprisonment with hard labour.

Sentence reduced.

Solicitors—*Clark & Clark*.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE BRANSON.

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WILLIAM GORDON.

If separate counts in an indictment charge incest against a man and a woman respectively, a verdict of guilty against one only may be good.

Appeal against conviction.

Appellant was convicted on May 15th, 1925, before Finlay J. at Manchester Assizes, of incest, and was sentenced to nine months' imprisonment.

Rymer Young for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. Appellant was charged in the first count of an indictment with committing incest with his sister, who was charged with the same offence in the second count. The prisoners were tried separately. Appellant was tried first and was convicted; the woman was tried afterwards and was acquitted. The offence with which they were charged was such that both must be guilty or both innocent, and in these circumstances the conviction of the one is repugnant to the acquittal of the other and impugns it, and it is therefore bad: *Plummer*, 1902, 2 K. B. 339; 71 L. J. K. B. 805; 86 L. T. 836; 66 J. P. 647; 20 Cox, C. C. 269; 18 T. L. R. 659: C. C. R.: c. q.; and *A. Edwards*, 13 Cr. App. R. 140: 1924: c. q.

Ronald Powell for the Crown was not called on to argue.

The LORD CHIEF JUSTICE: The charge against the appellant was that he committed incest with his sister in 1921. There were two counts in the indictment, the first charging the appellant and the second charging the sister. There were two separate trials, the appellant being convicted and the sister being acquitted.

It has been argued that as she was acquitted it follows that the conviction cannot co-exist with the acquittal. The cases which have been cited in support of the proposition deal with the offence of conspiracy. In particular, reference has been made to the case of *Plummer* (above), in which it was held that where, on the trial of an indictment charging three persons with conspiring together, if one pleads guilty and has judgment passed against him, and the other two are acquitted, the judgment passed against the one who has pleaded guilty is bad, and cannot stand. It is to be observed that even in that case, where the charge was one of conspiracy, Lord Alverstone C.J. said, on behalf of himself and Jelf J., that they concurred with the judgment of Wright and Bruce JJ., because they were unable to give satisfactory reasons for adopting a contrary view, and they added: "In so concurring we place great reliance on the fact that there was a joint trial on one indictment charging the three defendants jointly with conspiring together, and not alleging any conspiracy with other or unknown persons." But this is not a case of conspiracy. What had to be proved against the appellant in the present case? It must be shown (a) that he had had carnal knowledge of the woman, (b) that she was his sister, and (c) that he knew at the material time she was his sister. There was overwhelming evidence of these facts. For the woman to be convicted it had to be proved (a) that she had permitted carnal knowledge to take place with the appellant, and (b) that the appellant was her brother to her knowledge. It is clear that while the evidence may be overwhelming against the male prisoner in a case of incest, the female prisoner may be entitled to an acquittal either on the ground that she did not consent to the carnal knowledge, or on the ground that she did not know of the relationship between her and the male prisoner. It is easy to think of an example. A brother might go abroad when he and his sister were very young, and on his return he might have carnal knowledge with her when he knew her to be his sister but she did not know who he was. Similar considerations apply to the topic of consent. There are, in other words, fundamental differences in this respect between cases of conspiracy and cases of incest. This Court, however, has been asked to apply here, *per saltum*, the doctrine which has been laid down in conspiracy cases. In the present case there was abundant evidence against the appellant, including

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admissions made by him on two occasions. In these circumstances this appeal fails. It cannot be said that the sentence is too severe.

Appeal dismissed.

G. B.

The Court (Sankey, Salter and Branson JJ.) sat on June 15th.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

6 *July.*

JOHN GEORGE BEEBE.

Where a jury have to consider the evidence of an accomplice, the proper direction is that which is laid down in Baskerville, 12 *Cr. App. R.* 81: 1916.

Appeal against conviction on certificate.

Appellant was convicted on June 19th, 1925, before Roche J., at Lincoln Assizes, of using an instrument to procure miscarriage, and was sentenced to eighteen months' imprisonment.

St. John Hutchinson for the appellant, who was present. This conviction should be quashed. The girl whose miscarriage was attempted to be procured was an actively consenting party to what was done, and was therefore an accomplice; but there was no corroboration of her evidence. The judge, who accepted that fact in directing the jury, did not adequately put before them the need for corroboration, nor sufficiently warn them of the danger of convicting appellant on the uncorroborated evidence of an accomplice. The least warning that can be given is that it is *always* dangerous to convict on such evidence. *Baskerville*, 1916, 2 K. B. 658; 12 Cr. App. R. 81; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 25 Cox, C. C. 524; 60 S. J. 696.

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Van Oss (with him *Healy*) for the Crown. The judge sufficiently warned the jury.

The facts appear from the judgment.

G. B.

The LORD CHIEF JUSTICE (*a*): This appellant was indicted at the Assizes in Lincoln, before Mr. Justice Roche, for having, between certain dates in the year 1924, with intent to procure the miscarriage of a young woman named Ada Harrison, first unlawfully administered, or caused to be taken by her, a poison or other noxious thing, the nature of which was unknown, and, secondly, with having unlawfully used an instrument, or some other unknown means, for that purpose. In the result, the appellant was convicted upon the second count, and was sentenced to eighteen months' imprisonment with hard labour. He appeals against that conviction upon a certificate given by the learned judge himself. He also applies for leave to appeal against sentence. The grounds of the learned judge's certificate are "that in my opinion it is a proper case for the consideration of the Court on conviction only," and he refers this Court to the observations which he made in granting the certificate. It is enough to refer to two passages in the observations of the learned judge. He said first, at page 78 of the transcript which is before the Court, "I shall tell the jury that there is so little corroboration—so slight—I will not tell them that there is none—that they had better treat the case as if there were none, and that it is dangerous in these cases to convict without corroboration." He went on to say, "But I shall not tell them, as I might do in some circumstances, that they ought not to, or anything of that kind, or advise them not to. I shall advise them to be very careful." That was before the summing-up. In the course of the summing-up, at page 81, he said, "I tell you that it is generally dangerous to convict on evidence of an accomplice, but I am not going to tell you, as I could not, that you ought not, or that you must not. I am not going to advise you that you ought not to; I am going to leave that to you." And a little later, "If you are quite certain that that girl is telling the truth and nothing but the

(*a*) This judgment is printed from a transcript of the shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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truth so that you are satisfied in your heart and conscience, although it is uncorroborated, you ought to act upon it. If you are not satisfied up to the very hilt then do not do it." Finally, on a later day, when a formal application was made for a certificate for leave to appeal, the learned judge said this: "The reason I grant it is that I think it is a proper case for the consideration of the Court of Criminal Appeal whether my direction was adequate and proper, and, secondly, whether the circumstances were such as to warrant a conviction."

It is not necessary to review the facts; the matter comes before this Court for argument *ex concessis* upon the footing that here there was no corroboration of the evidence of the accomplice. That being so, the short question is whether that which was done here by way of warning was sufficient to satisfy the requirements of the common law. The law upon that matter is to be found now in the considered judgment of this Court in *Baskerville's* case in 1916 (2 K. B. 658), at p. 663 (12 Cr. App. R. 81), where these passages occur. "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: see *Rex* v. *Attwood* (1787). But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence," and reference is made to *Stubbs's* case (1855) and to the case of *In re Meunier* (1894). A little later the judgment says this: "But this Court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this Court, after considering all the circumstances of the case, thinks the verdict "unreasonable," or that it "cannot be supported having regard to the evidence," and reference is made to sub-s. 1 of s. 4 of the Court of Criminal Appeal Act.

Now that passage, which begins by pointing out the necessity of the warning and ends by referring to the legal power of the jury to convict upon unconfirmed evidence, refers to two cases which it may be useful to refer to again. The first case is *Stubbs*, about seventy years ago. In that case, in Dearsley

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and P.'s Crown Cases, 557, Chief Justice Jervis said this: "It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that being so, it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge and require confirmation." I read that passage not least because Baron Parke was a member of that Court and added these words at page 558: "During the time that I have been upon the Bench, now more than a quarter of a century," so that carries us back to the year 1830 at least, "I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice: I have always told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice, but that great caution should be exercised; I have advised them, and juries have acted on that advice, not to find a prisoner guilty on such testimony unless it was confirmed." Similar language is to be found in *Meunier's* case in 1894 (2 Q. B. p. 415); and that law is compendiously recited in the short passage in the judgment in *Baskerville's* case that I have already read. What does that judgment say? A clear distinction is drawn, although it is drawn in very few words and without any elaboration or explanation, between three things: one, is to tell the jury that it is within their legal province to convict upon such unconfirmed evidence; the second is, and this is a rule of universal application in such cases, not a rule to be neglected in some cases and observed in others, but a rule of universal application, it is a duty to warn the jury of the danger of convicting a person on the uncorroborated testimony of an accomplice or accomplices; the third thing is, that the learned judge in the exercise of his discretion may advise them not to convict upon such evidence. One reads that passage side by side with the passages in the cases referred to, where it appears that so far as Baron Parke was concerned he always advised a jury in such circumstances not to find a person guilty. But however that may be, there is a distinction drawn between the three different things the jury are to be told; that it is within their legal province to convict; they are to be warned in all such cases

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that it is dangerous to convict; and they may be advised not to convict.

It is quite clear when one looks at that enumeration of the various courses, that nowhere is to be found directly or indirectly any reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict. Now what has happened here? First of all, has the warning itself been clearly and sufficiently given? The important words are: "So far as that matter is concerned, I tell you that it is generally dangerous to convict on the evidence of an accomplice." With great respect to the learned judge that is not the warning referred to. That warning may well convey to the minds of the jury that, although as a rule it is dangerous to convict on the evidence of an accomplice, that rule is by no means of universal application, and that there may be cases in which it is quite safe to convict upon the evidence of an accomplice without corroboration, and, by implication, that this case is one of such cases. And then one finds that passage followed by this passage: "If you are quite satisfied that that girl is telling the truth and nothing but the truth so that you are satisfied in your heart and conscience although it is uncorroborated, you ought to act upon it." Those words are not only not a warning of the danger of so acting, and not only are they not a refraining from advising the jury so to act, but they are quite clearly an affirmative and express direction to the jury that in that event they ought so to act. In the opinion of this Court that direction is not such a direction as should, according to the law laid down in *Baskerville's* case, be given. It may very well have led the jury to think that upon the particular facts of this case the general warning had no real application, or might be disregarded.

In those circumstances as this case is argued, as it must be argued, upon the footing that here there was no corroboration at all, we think that the doubts entertained by the learned judge about the adequacy of his direction were well founded, and this appeal therefore ought to succeed and this conviction ought to be quashed. The appeal is allowed.

Conviction quashed.

Solicitors for Appellant—*Miller & Smith*, for *Clitherow & Sons*, Horncastle.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

PERCY HAROLD MARSH.

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The mere fact that the accused preserves a letter written to him by the prosecutrix of a charge of a sexual offence is not corroboration of her evidence: nor is his mere silence when he is charged with the offence.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on June 17th, 1925, before Roche J., at Lincoln Assizes, of having had unlawful carnal knowledge of a girl under sixteen, and was sentenced to twelve months' imprisonment with hard labour.

A. M. Lyons for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The story of the girl was not corroborated. Certain matters were, however, referred to by the judge in summing-up as being corroboration which, in fact, were not corroboration.

[He was stopped.]

Sandlands for the Crown. There was sufficient corroboration First, there was evidence of a letter written by the girl to the appellant dealing with intimate matters, which document the appellant had preserved, thus showing he cared enough for the girl to keep her letters. Secondly, when he was charged he made no reply. *Fliegenbaum*, 1919, 1 K. B. 431; 88 L. J. K. B. 551; 120 L. T. 572; 83 J. P. 123; 14 Cr. App. R. 1; 26 Cox, C. C. 387.

The LORD CHIEF JUSTICE: This appellant, Percy Harold Marsh, was convicted at Lincoln Assizes of having had unlawful carnal knowledge of a girl under sixteen years of age. He was

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sentenced to twelve months' hard labour, and now, by leave of the Court, he appeals against conviction and sentence. It is not necessary to repeat the whole of the evidence in the case. It is enough to say that, according to the story of Ellen Violet Miller, on or about the 11th and the 14th days of December last the appellant took her for a walk and had connection with her, and also on the Sunday before Christmas Day, that is to say, the 21st day of December. The medical evidence was that the girl was undoubtedly pregnant, and, according to the original computation of the doctor, her confinement was to be expected about the middle of July; and he said it was exceedingly unlikely that connection on the 11th, 14th or 21st December caused her present condition. That testimony is further supplemented now by a statement that the girl has not yet been confined, but her confinement is expected on or about the 30th day of this month. The position therefore was that the girl alleged as the days upon which this had happened to her, as the result of which she was pregnant, these days in December which the doctor could not make to conform with the condition of pregnancy that he observed. That is an important fact in the case, and it became all the more necessary, therefore, that there should be a clear direction to the jury upon the need of corroboration of the girl's story.

With regard to the general statement in the summing-up of the nature of corroboration, no criticism is offered by counsel for the appellant. What is said, however, is that, corroboration having been adequately and accurately defined, the summing-up proceeded to refer to two matters as satisfying that definition. Those matters were, first, that there was in the possession of the appellant a letter from this girl. That letter was not made use of by the prosecution in the sense that it was a letter to which a reply might have been expected and no reply had been sent. The use which was made of it was to argue that it was a remarkable thing that such a letter should be written by the girl to the appellant, and by him preserved, unless her story was true. In other words, the girl was to corroborate herself, subject to this, that the appellant had not destroyed the letter he received. One wonders what would have been said if, having received it, he had destroyed it.

The second incident of alleged corroboration was the fact, as

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it was said, that when he was charged with the offence by the police, he did not immediately deny it. Reliance was placed in argument on a case dealing with the omission of a prisoner to make any remark when an accomplice's statement incriminating him is made in his presence, and the argument is that these two matters are upon the same plane. That argument, of course, cannot be sustained. But here it appears that the charge made by the police was made by a police constable stationed at Grimsby, who, upon the 8th April, received the appellant into custody from the Grimsby Borough Police. There was no evidence at all of what was said or omitted by the appellant at the time of his original arrest. It cannot be said that, in those circumstances, when he was charged and warned that he need not say anything, his saying nothing (because, as he stated in his evidence: "If I had said something the officer would have taken me just the same") amounts to corroboration.

In these circumstances it appears to us that this conviction is unsatisfactory and cannot stand. The appeal, therefore, is allowed and the conviction is quashed.

Conviction quashed.

G. B.

JOHN JAMES HATTON.

All the provisions for offences mentioned in s. 12, *sub-s.* 1, *of* 8 *Ed.* 7, *c.* 67, *the Children Act*, 1908, *are governed by the clause "in a manner likely to cause . . . suffering, &c."* (*a*).

There must be a direction upon the need of corroboration of evidence of children of tender years.

Appeal against conviction and sentence.

Appellant was convicted on May 21st, 1925, before the Deputy-

(*a*) Children Act, 1908, s. 12, sub-s. 1, provides:—"If any person over the age of 16 years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour. . . ."

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Chairman at London Sessions, of an assault on a child contrary to s. 12, sub-s. (1) of the Children Act, 1908, and on June 11th, 1925, he was sentenced to six months' imprisonment.

Sells for the appellant, who was present. The words in s. 12 sub-s. (1) of the Children Act, 1908, "in a manner likely to cause unnecessary suffering or injury to health," govern the word "assault," and here there was no evidence of such suffering. There was, moreover, no corroboration of the evidence of the child.

[He was stopped.]

Julian Fuller for the Crown. It is conceded that "in a manner" and the following words qualify "assault," but here there was clear evidence of unnecessary suffering. The summing-up contained an ample warning against acting on the uncorroborated evidence of very young children, and, in any case, there was sufficient corroboration here. He referred to *Marshall*, 18 Cr. App. R. 164: 1925: c. q.

The LORD CHIEF JUSTICE: This appellant, John James Hatton, was tried at the London Sesssions upon an indictment under s. 12 of the Children Act, 1908, for that he, having the custody of one Doris Clondon, a child aged twelve, did assault her in a manner likely to cause her unnecessary suffering. There were two trials. At the first trial in the month of May the jury disagreed. At the second trial, which took place on May 21st, the appellant was convicted. Sentence was postponed till June 11th, and now the appellant, by leave, appeals from the conviction and from the sentence which was passed upon him of six months' imprisonment.

With regard to the facts of the case, it is enough to say that the child was called, and said she was twelve years old. She was the daughter of the appellant's wife by her first husband. She swore that on April 9th, which was the day before Good Friday, her mother went out about 8 o'clock in the evening and the appellant came in ten minutes afterwards, and that she gave him some tea in the kitchen. She said that when he had finished the tea, she took the tea things into the scullery to wash them.

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The appellant came into the scullery, turned the light out and went back into the kitchen and called her. She went into the kitchen and he shut the door, and then he did an act, not to her, but in her presence, and she screamed, and he put his hand over her mouth. She tried to reach the door, and he got hold of her and sat down and said, "I have not done anything."

The learned Deputy-Chairman, in summing-up the case, began with these words, "The prisoner is charged with assaulting this little girl in a manner likely to cause her unnecessary suffering. There is, and can be no dispute, if the facts are anything like what are sworn to by that little girl, that the prisoner did assault her in a manner likely to cause her unnecessary suffering. Therefore the only question you need seriously to consider is whether the offence has been proved," and so on. That was all the direction that the members of the jury were given upon the question of law which was involved. Under this section it is not denied that the opening words are just as much qualified by the last words as the intermediate words are, and therefore, to read the words of the section which are said to apply to the present case, leaving out the intermediate words, one gets this result, "If any person over the age of sixteen years who has the custody of any child wilfully assaults such child in a manner likely to cause such child unnecessary suffering or injury to his health that person shall be guilty of a misdemeanour." The words "in a manner likely to cause such child or young person unnecessary suffering or injury to his health" govern the words "wilfully assaults," and the sentence which is provided by the section—a sentence of two years' imprisonment with or without hard labour—makes it plain that what is contemplated by the section is something more than an ordinary assault, namely, a wilful assault such as is likely to cause the child unnecessary suffering.

It was extremely important in the present case that the jury should be directed on the meaning of the section. The assault which was relied upon consisted only in that the appellant was said to have put his hand over the child's mouth to prevent her from screaming. But it is quite obvious, when one looks at the case as a whole, that what might very easily be in the minds of the jury was the reflection that that which was done in the presence of the child, if it was done, was likely to cause, if not suffering, at any rate no little agitation of mind, and astonish-

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ment and disgust. That, however, was not the assault. That the appellant might be convicted under this section of the statute it was necessary to show that there was a wilful assault in a manner likely to cause the child unnecessary suffering. In other words, the summing-up omitted to direct the attention of the jury to the real point of the case, and indeed in its terms it was such as might easily convey to the jury that the real point of the case was something different from what it was.

That is enough to dispose of the present matter, but it is desirable also to add that in view of the relationship of certain persons, witnesses in the case, this was pre-eminently a case in which a clear and unmistakable direction should have been given upon the necessity of corroboration of the evidence given by a child of this tender age. There is no such warning from first to last in the summing-up. On the contrary, the passages which are relied upon as at any rate approaching such a warning are more open to the construction that they might well convey to the jury that corroboration was not necessary. There are other points in the case, but for these reasons, in the opinion of this Court, this conviction is unsatisfactory. The appeal is allowed, therefore, and the conviction is quashed.

Conviction quashed.

G. B.

Solicitor for the Appellant—*C. H. Weeks.*

On July 20th two Courts sat, the first consisting of Mr. Justice Avory, Mr. Justice Shearman and Mr. Justice Branson, and the second of the Lord Chief Justice, Mr. Justice Avory and Mr. Justice Shearman.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

RALPH RENTON. 1925 27 *July*.

The gist of the crime of obtaining by false pretences is an intent to defraud: direction on this point must be clear.

Appeal against sentence by leave of Roche J., and appeal from order of Roche J. refusing leave to appeal against conviction.

Appellant was convicted on June 22nd, 1925, before the Chairman at Durham County Sessions, of obtaining goods by false pretences, and was sentenced to five years' penal servitude.

Appellant in person.

Ronald Powell for the Crown. The summing-up was adequate. The need of an intent to defraud was sufficiently indicated by the direction that the jury must consider whether they thought that the appellant had been carrying on an honest business.

The LORD CHIEF JUSTICE: The appellant was an egg and potato merchant, and he was charged with getting large quantities of goods by false pretences. We are of opinion that the summing-up failed to direct the jury on the essential principle of the applicable law, namely, that the prosecution must prove an intent to defraud in the appellant. There are indeed passages from which a person unskilled in the law might infer that intent to defraud was immaterial. Although there was evidence on which the jury might properly have convicted the appellant, it cannot be said that, after an adequate summing-up, they would inevitably have convicted. This appeal must therefore be allowed.

Conviction quashed.

G. B.

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FRANK KING.

Upon an indictment for inflicting grievous bodily harm, the wife of the prisoner must not be called as a witness for the Crown.

Appeal against conviction and sentence.

Appellant was convicted on June 30th, 1925, before the Chairman at Oxfordshire Sessions, of inflicting grievous bodily harm, and was sentenced to three months' imprisonment in the second division.

Ralph Thomas for the appellant, who was not present. There were a number of irregularities at the trial, the first of which was that the appellant's wife was called as a witness against him.

[He was stopped.]

Harold Hardy for the Crown. No objection to the calling of the appellant's wife was raised at the trial. She had been called before the magistrates, her evidence was in the depositions, and defendant was represented by counsel: he was not prejudiced by her evidence: the assault was proved by other witnesses. The summing-up dealt with the question of lawful excuse because the defence relied on *Levett*, Cro. Car. 538; 1 Hale, P. C. 42, 474: 1639. The verdict "guilty of inflicting grievous bodily harm, but not of wilful wounding" was taken to mean that there was no felonious intent, but this was never charged. The main defence was that the injuries were inflicted on the prosecutor in self-defence, and that was sufficiently put to the jury in the summing-up.

The notice of appeal only alleged misdirection.

The Lord Chief Justice: There are various unsatisfactory features in this case. First, the first witness called for the prosecution was the appellant's wife; that, of course, was directly contrary to the law. Secondly, there was no mention in the summing-up of the defence of accident, although the evidence showed that what had happened might have been accidental. Thirdly, the jury, in reply to a question, found the appellant

guilty of inflicting grievous bodily harm, but not of "wilful wounding." What that meant it is impossible to say, but it might be that the jury were not satisfied that the injury inflicted on the prosecutor had been done wilfully. This appeal must be allowed.

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FRANK KING.

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Conviction quashed.

G. B.

Solicitors for the Appellant—*Sharpe, Pritchard & Co.*, for *Franklin & Son*, Oxford.

JAMES WALLS *alias* JAMES RUSSELL.

30 *July.*

Severity of sentence after previous convictions.

Appeal against sentence by leave of the Court.

Appellant was convicted on July 2nd, 1925, before the Chairman at Warwickshire (Coventry) Sessions, of pavilion-breaking, and was sentenced to eighteen months' imprisonment with hard labour.

Appellant in person.

The Crown was not represented by counsel.

The LORD CHIEF JUSTICE: The appellant was convicted of breaking into a golf pavilion and stealing some drink, cigarettes and eggs. He is forty years of age, and he has had some previous convictions, but one is struck by the fact that between 1912 and 1923 there were none. Since 1923 he has been convicted of stealing and also of housebreaking. I need only repeat here what has often been said, namely, that, if the offence of which a man has been convicted is essentially minor, it is not right that he should receive a severe sentence on the sole ground that previously he has been guilty of serious offences and has received

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JAMES WALLS *alias* JAMES RUSSELL.

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considerable sentences for them. That is always true, and obviously so where a considerable interval of honest livelihood has separated the more serious offences from the minor offence. In all the circumstances we are of opinion that this sentence may properly be reduced to one of six months' imprisonment with hard labour, to run, since leave to appeal was given, from the date of the conviction.

Sentence reduced.

G. B.

WILLIAM DIXON.

When the only witness for the Crown on a charge of larceny may be the receiver of the stolen property, the jury should be warned that they may require corroboration.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on June 29th, 1925, before the Chairman at Lincolnshire (Parts of Holland) Sessions, of the larceny of a quantity of potatoes, and was sentenced to twelve months' imprisonment with hard labour.

Stanfield for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present, was not called upon to argue.

Ronald Powell for the Crown. I have looked at the summing-up and I cannot support it, nor can I submit that, with a proper direction, the jury must inevitably have convicted appellant.

The LORD CHIEF JUSTICE: The appellant was charged with two others and they were all convicted. The main witness for the prosecution was a labourer who bought the potatoes at a very low price. His evidence was corroborated in the case of the other two prisoners, but it was the only evidence against the appellant. The jury, however, were never told that they might think that this labourer might be a receiver of the stolen property, and that, if they took that view, they ought to look for corroboration of his

testimony in considering its bearing on the case of each defendant. In these circumstances we have come to the conclusion that this conviction cannot stand.

Conviction quashed.

G. B.

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WILLIAM DIXON.

Hewart L.C.J.

JOHN MACLENNAN.

If counts for fraudulent conversion and for obtaining by false pretences are left to the jury, they must be directed on each offence.

Appeal against conviction by leave of the Court.

Appellant was convicted on June 29th, 1925, before Rowlatt J., at Stafford Assizes, of obtaining by false pretences, and on July 2nd, 1925, he was sentenced to twelve months' imprisonment in the second division.

Frederick Levy for the appellant, who was present. The prosecution alleged that appellant had obtained money by falsely representing that he had a substantial and profitable dental practice. In the first place, the false pretences alleged only amounted to a "puff" of the practice. In the second place, the jury were not directed on the charge of obtaining by false pretences, but only on another charge against appellant of fraudulent conversion, but they found him guilty of false pretences.

A. J. Long for the Crown. What occurred here was more than a "puff." There was a misrepresentation which exceeded an expression of opinion and amounted to a misrepresentation of existing facts. If appellant ever had a genuine practice at all, he had a practice of the class represented. The jury were directed on the charge of obtaining by false pretences. Certain of the false pretences were abandoned, though no *count* was abandoned. The false pretence *ultimately* relied on by the Crown in each count for false pretences was the alleged misrepresentation. Appellant really had no practice.

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[The LORD CHIEF JUSTICE: If the appellant merely expressed an opinion it was not an offence; if it was a misrepresentation of fact it was.]

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment containing five counts. At the trial the prosecution abandoned some of the facts in the counts relating to the false pretences, but not one count which alleged that the appellant had obtained money by representing that he had a substantial and profitable practice in dentistry. The law is clear on this matter, and is well stated in *Archbold* (26th ed.) at pp. 699, 701 and 702. It is not possible now to add to or subtract from the principles which are summarised there. In the present case it appears that there were two elements of confusion in the conduct of the case, first, in the direction of the judge to the jury, and secondly, in the minds of the jury regarding their verdict. The jury were invited to consider whether the appellant was guilty of fraudulent conversion, and not whether he was guilty of obtaining by false pretences, but they convicted him of the obtaining by false pretences, and were silent about the charge of fraudulent conversion. The reason for the confusion does not clearly appear, but on the whole the trial and the verdict were unsatisfactory, and the appeal must be allowed.

Conviction quashed.

Solicitor for Appellant—*Percy Robinson & Co.*

G. B.

The Court (the Lord Chief Justice, Shearman and Swift JJ.) also sat on July 31st.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE TALBOT.

HENRY HERBERT JONES. 1925 18 *August.*

When in a trial for larceny asportation of documents has been proved, there must be a direction whether it took place animo furandi *or not.*

Application for leave to appeal against conviction and sentence.

Applicant was convicted on July 29th, 1925, before the Chairman at Middlesex Sessions, of larceny from the person, and was sentenced to four months' imprisonment in the second division.

W. H. S. Truell for the applicant (under s. 10 of the Criminal Appeal Act 1907), who was present. The question whether applicant intended to steal or only to defeat an execution was not put to the jury. He cited *T. Bailey*, L. R. 1 C. C. R. 347; 41 L. J. M. C. 61; 12 Cox, C. C. 129: 1872: c. q., on one count.

The Hon. Ewen Montagu for the Crown. The question whether there was an intention to steal was sufficiently put to the jury.

SWIFT J.: On April 20th a loan company lent 30*l.* to the applicant's wife on the security of her furniture. She executed a bill of sale, and the applicant signed a declaration disclaiming any property in the furniture. Later the loan company gave a firm of auctioneers authority to seize the furniture, and the bailiff's men called at the applicant's premises armed with the bill of sale, the authority and the disclaimer. The applicant asked to look at the papers, and he snatched them out of the man's hands. There was, no doubt, ample evidence to go to the jury that the applicant stole the papers, but there was also the view that he took them to prevent, by the destruction of the authority, the seizure of the furniture. That alternative was not put to

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the jury by the Chairman. As counsel for the applicant and for the Crown are both before this Court, the matter will be treated as a final appeal, and the conviction will be quashed.

Conviction quashed.

G. B.

THOMAS JAMES JONES.

The correct direction on a charge of indecent assault is that it is not safe to convict on the uncorroborated evidence of the prosecutrix, but that the jury, if they are satisfied of her veracity, may, after paying attention to that warning, nevertheless convict.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on June 30th, 1925, before the Chairman at Merionethshire Sessions, of indecent assault, and was sentenced to twelve months' imprisonment with hard labour.

R. G. C. Bankes for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The issue in the case was never put to the jury by the Chairman. The jury were never told that the burden of proof was on the prosecution, nor warned of the danger of acting on uncorroborated evidence. *T. Finch*, 25 Cox, C. C. 537; 115 L. T. 458; 12 Cr. App. R. 77: 1916; c. q. The Chairman told the jury matters which were on the depositions but were not proved at the trial.

Ronald Powell for the Crown. There were undoubted omissions and irregularities, but the case was extremely short and the issue was very simple. The facts were before the jury, and there was a reference in the summing-up to the fact that the girl's evidence was uncorroborated: *W. Crocker*, 17 Cr. App. R. 46; 39 T. L. R. 105: 1917.

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The LORD CHIEF JUSTICE (*a*): This appellant, Thomas James Jones, was convicted at the Quarter Sessions for Merionethshire at Dolgelly upon a charge of indecently assaulting a young woman. He was sentenced to twelve months' hard labour. He now appeals against that conviction and sentence.

It is not necessary to restate the evidence in the case. Complaint is made here of the summing-up of the Chairman of Quarter Sessions. With all that was said by the Chairman of the seriousness and the unpleasantness of such cases, and the importance of bringing wrongdoers in such cases to justice, everybody must of course agree. The question was not whether the offence was a serious offence, and not whether the wrongdoer ought to be punished. The question was whether the man who was charged as defendant was really the wrongdoer.

Now that being the question three observations are made upon the summing-up. The first is that nowhere does it state that the burden of proof in such a case is upon the prosecution. There is not from beginning to end of the summing-up one word to the effect that the prosecution have to make out the case. Secondly, in two passages the summing-up describes as the whole question and the only crucial point whether the accused was seen and spoken to on the road on the 25th of May. That of course is, to say the least, an insufficient statement. It was not at all the whole question, although no doubt that question was of importance to the minds of those who had to consider the whole question. The third observation is that not only is there not here the proper direction about the need of corroboration in such a case, but the words which are employed amount almost to a negative of that direction. The proper direction in such a case is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence, may, after paying attention to that warning, nevertheless convict. What is said here, and it is said by way of a kind of postscript to the summing-up, after the summing-up has dealt with what is described as the whole point, is this: "I don't think I need call your attention to anything else. There is no reason why you should not believe the girl, although I must point out that her evidence is not corroborated. She has no witnesses, as

(*a*) This judgment is printed from a transcript of a shorthand note supplied by the courtesy of the Director of Public Prosecutions.

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it was not expected she would have." Now that is not the warning which is required. It is rather a suggestion that no such warning is requisite. For each and all of these reasons we are of opinion that this appeal must succeed and this conviction must be quashed.

Conviction quashed.

G. B.

JOHN WILLIAM KAY.

On a charge of obtaining by false pretences there must be a direction on the issue of intent.

Appeal against conviction and sentence.

Appellant was convicted on July 17th, 1925, before the Recorder at Cardiff City Sessions, of obtaining a cheque for 150*l.* with intent to defraud, and was sentenced to eighteen months' imprisonment with hard labour.

R. F. Burnand for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The summing-up omitted any direction on the need of intent to defraud.

Temple Morris for the Crown. I cannot carry the case any further.

The LORD CHIEF JUSTICE: On a proper direction the jury might still have convicted the appellant, but it is impossible to say that they certainly would have done so. Among other things, the summing-up is defective, in that it makes no reference to the need of proof of an intention to defraud on the part of the appellant. The conviction is therefore quashed.

Conviction quashed.

G. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SANKEY, AND MR. JUSTICE SALTER.

REGINALD ASA SHARMAN.

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19 *October.*

The Court will amend an incorrect record, though it may not vary the sentence.

Appeal against conviction and sentence.

Appellant was convicted on July 3rd, 1925, before the Chairman at Lincolnshire (Lindsey) Sessions, of larceny, and was ordered to be returned to an industrial school until he was sixteen years old.

C. K. Tatham for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The record in this case is wrong. Appellant was tried on an indictment which charged him with stealing and receiving money and a lady's handbag on May 30th, and with stealing and receiving another handbag, money and a pencil on June 8th. On the suggestion of counsel for the prosecution it was agreed that he should be tried on the first charge only, and this was done. The record, however, shows a general conviction on the indictment. Moreover, he was not sufficiently warned that he had a right to give evidence although he was not defended by counsel, and the summing-up was quite inadequate.

E. L. Hadfield for the Crown was not called on to argue.

AVORY J.: It is clear that the record before us, which appears to record a verdict of guilty on the whole indictment against the appellant is wrong. We have, therefore, an obvious duty to correct it, and we do so by directing that the verdict shall be entered as one of guilty on the first charge only. The result is

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that the counts relating to the second charge will remain on the file, but, in view of the circumstances of the case, we think it right to say that the responsible authorities should not take any further action. Having regard to the fact that the boy had been previously convicted, it is probable that he knew that he had a right to give evidence, but in any case, it could not have been of any advantage to him to have gone into the witness box, since he had already admitted his guilt to the police. This Court has held that the mere omission to inform a prisoner of his right to give evidence does not vitiate the proceedings if no miscarriage of justice has taken place. Some criticism has been passed on the summing-up, and if the case had been one which called for a summing-up, we should have had to take notice of the omission properly to direct the jury. It is, however, clear that the case did not call for a detailed summing-up. The Court sees no reason to interfere with the sentence.

Verdict varied: "Guilty" on certain counts only substituted.

G. B.

WALTER HAROLD REVILL.

As a general rule, the term of detention in a Borstal Institution should be three years.

Term of sentence increased.

Appeal against sentence.

Appellant was convicted on July 28th, 1925, before the Recorder at Salford Borough Sessions, as a rogue and vagabond, and was sentenced to two years' detention in a Borstal Institution.

Appellant, in person, did not add anything to his grounds of appeal.

The Crown was not represented by counsel.

AVORY J.: The appellant has been convicted on five previous occasions of larceny—in July, 1920; in April, 1921; twice in April, 1924; and again in April, 1925. He was released from his last sentence on June 10th, 1925, and on July 10th he was found at night at Preston in the circumstances which led to his

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conviction as a rogue and vagabond. On being informed that if he persisted in his appeal the Court might increase his sentence, he replied that he understood that the Court had that power, but that he preferred to persist in his appeal. This Court has recently had to consider the question of detention in Borstal Institutions, and we are satisfied by the information which has been given to us, and particularly by reports of the authorities of the Borstal Association, that a sentence of less than three years' penal servitude is not one to be recommended. If the appellant shows a proper desire to reform and to lead an honest life, he will be released on licence before the end of the three years, but that the authorities may have complete control over him for his own benefit, we have come to the conclusion that his sentence must be increased to one of three years' Borstal detention.

This is another instance of the frivolous appeals by which the time of this Court, of others, and of public money is wasted.

Term of sentence increased.

G. B.

The same Court sat on October 26th and 27th.

ALBERT GUNTRIP.

2 *November*.

Severity of sentence after an interval of honest life.

Appeal against sentence.

Appellant was convicted, on October 6th, 1925, before the Chairman, at Oxfordshire Sessions, of housebreaking, and was sentenced to two years' imprisonment with hard labour.

Appellant in person.

The Crown was not represented by counsel.

AVORY J.: The appellant was convicted six times of offences of dishonesty before the war. He enlisted in the Army and

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served during the war, and was demobilised in 1919. He re-enlisted and served until 1922. He was then convicted of stealing a bicycle, and was sentenced to six months' imprisonment. Since that date there is no record of any offence until the one with which we are dealing to-day. It does not appear that the Chairman, in passing sentence, took into consideration that there was an interval of three years' honest life between the offence of 1922 and that of which the appellant has lately been convicted. In these circumstances we think that the sentence is too severe, and we reduce it to one of fifteen months' imprisonment.

Sentence reduced.

ROBERT ERNEST SHEAF.

On a charge of fraudulent conversion under s. 20 (1) (*iv*) (*a*) *of* 6 *&* 7 *Geo.* 5, *c.* 50, *the Larceny Act*, 1916, *the question whether money has been entrusted to or received by defendant for or on account of other persons is a fact to be decided by the jury: as it is vital, they must be expressly directed to find on the point, and it is not sufficient that it has not been withdrawn from them.*

Proof of a general deficiency without reference to specific dates may not be sufficient to support an indictment for fraudulent conversion.

A general verdict of guilty on an indictment with a count bad in law is bad.

Appeal against conviction on a point of law, and application for leave to appeal against sentence.

Appellant was convicted, on July 27th, 1925, before Finlay, J., at Leeds Assizes, of fraudulent conversion, and was sentenced to six months' imprisonment in the second division. He was on bail.

Ronald Powell for the appellant. The appellant, who is a clergyman, was tried on an indictment charging him, under s. 20 (1) (iv) (b) of the Larceny Act, 1916, in the first two counts with fraudulently converting to his own use and benefit 1,504*l.* and 184*l.* received by him for or on account of the St. John's, Staincross, Clothing Club, and under s. 20 (1) (iv) (a) of the Act in seven further counts with fraudulently converting

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certain specific sums entrusted to him by certain members of the club to pay the same to certain tradesmen or otherwise apply it for their benefit. Appellant had been curate-in-charge of St. John's, Staincross, Yorkshire, and had had control of the St. John's Clothing Club. The members of the club made certain weekly payments to him, and he in return gave them credits to local tradesmen for the amount of their subscriptions plus a bonus which he obtained either by putting the money on deposit at a bank or by obtaining a discount from the tradesmen, or by both methods. An audit held in 1925 showed deficits in the funds of the club. The appellant was charged under s. 20 (1) (iv) of the Larceny Act, 1916, and it was a question of fact for the jury whether he had ever been entrusted with the money or had ever received it for or on account of the clothing club: *W. H. Cuffin*, 127 L. T. 56; 16 Cr. App. R. 179: 1922; *Donald Smith*, 1924, 2 K. B. 194; 93 L. J. K. B. 1006; 18 Cr. App. R. 76; 131 L. T. 28; 88 J. P. 108. That question was, however, never put to the jury by the judge in summing up. It is submitted that in any case nothing more than a civil contract existed between the appellant and the members of the club that, in return for money paid by them, he should give them credit for some larger sum. He never acted as their agent or trustee.

Mortimer, K.C. (with him, *Ronald Ross*) for the Crown. The question of entrustment was never withdrawn from the jury. There was such ample evidence of receipt and entrustment that the jury must have found the appellant guilty.

He referred to *H. Bottomley*, 127 L. T. 847; 38 T. L. R. 805; 16 Cr. App. R. 184: 1922.

AVORY J.: This appeal has caused the Court considerable anxiety because undoubtedly, as Finlay J. said when he left the case to the jury, there was evidence on which the jury could come to the conclusion that the appellant had dishonestly appropriated this money and fraudulently used it for purposes other than those for which it had been entrusted to him. The jury convicted the appellant thinking that fraud or dishonesty was the only question which they had to determine. It appears that at the close of the case for the prosecution counsel for the defence submitted that

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there was no case to go to the jury, on the ground that there was no evidence that the appellant had been entrusted with the money within the meaning of s. 20 (1) (iv) (a) of the Larceny Act, 1916, or that he had received it for or on account of some other person within the meaning of s. 20 (1) (iv) (b). That submission was overruled by the judge as a question of law, and, unfortunately, the case then appears to have proceeded solely on the issue whether the money had disappeared merely in consequence of the appellant's carelessness, negligence or ignorance of finance or of book-keeping. When the judge came to sum up he was misled by counsel having confined themselves to that one issue into himself directing the jury that that was the only question for them. He did not leave to them the vital question whether the appellant had ever been entrusted with the money or had received it within the meaning of the sub-section. *D. Smith* (above) is a direct authority that that is a question of fact which ought to be left to the jury. That question, however, was not left to them in the present case. True that it was not withdrawn from them, but it is not sufficient to say that, because a vital question of fact has not been withdrawn from them, we are to assume that the jury had it in their minds and were conscious that they had to decide it. It is impossible to believe, in view of the summing-up, that the jury retired with any consciousness that they had to determine as a question of fact whether the money had been entrusted to or received by the appellant for or on account of these persons, and it is impossible, further, to say, that if that question had been left to the jury, how they would have determined it. It is not sufficient to say that if the question had been left they *might* have determined it against the appellant. When we once arrive at the conclusion that a vital question of fact has not been left to the jury, the only ground on which we can affirm a conviction is that there has been no miscarriage of justice, on the ground that if the question had been left to the jury, they must necessarily have come to the conclusion that that appellant was guilty. It is quite impossible to say that the jury must inevitably have answered the question to which I have referred against the present appellant. In view of the fact that there were no rules of this so-called club, it is clearly impossible to say what the appellant's duty with regard to this money was, and, consequently, that he was guilty of a breach of his duty as

agent if he had paid the money into his own current banking account so long as he performed his contract when the time came. The whole position between him and the subscribers to the "club" is left so vague that it is impossible to say what the result would have been if the jury had been told that they must, first of all, determine whether the money was ever entrusted to him for the specific purpose laid in the indictment, or whether it was ever received by him for or on account of the members of the club.

That ground alone is sufficient to show that this conviction cannot stand. But, apart from that, the verdict of guilty is a general verdict of guilty on the whole indictment, including the first and second counts. The first count charged the appellant that he did on October 31st, 1923, fraudulently convert to his own use and benefit 1,504*l.* received by him for or on account of the St. John's Clothing Club. The second count charged him that he did on October 31st, 1924, fraudulently convert to his own use and benefit 184*l.* received by him for or on account of the St. John's Clothing Club. The first count related to what was alleged to be a general deficiency extending over seven or eight years, and the second count related to what was alleged to be a general deficiency extending over the period between October 31st, 1923, and October 31st, 1924. No point, unfortunately, appears to have been taken at the trial that these two counts were insufficient in law. If the point had been taken, especially in view of the fact that counsel for the Crown has to-day said quite frankly that, if these two counts stood alone, he would not be prepared to support the conviction of the appellant, it is probable that the judge would have quashed these counts. If they had been quashed and the jury had been left to determine the specific charges in the other counts, and if they had been directed particularly to the question of fact whether the sums specified had been entrusted by the members of the club to the appellant for the purposes laid in the indictment, it is impossible to say that the jury nevertheless would have convicted the appellant. Reference to the authorities relating to embezzlement, in which it has been made clear that it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received, makes it clear that these two counts in the circumstances

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of this case were bad in law and ought to have been withdrawn from the jury. They were, however, left to the jury, and the substance of the case left to the jury was contained in them, because the jury were told: "Here is this large deficiency, and the only question for you is whether the loss of the money was by the negligence or by the fraud of the defendant." The appeal must be allowed.

Conviction quashed.

Solicitors for the Appellant—*Kenneth Brown, Baker and Baker,* for *Mr. Ernest Hind,* Bradford.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

9 *November.*

ALFRED ARTHUR KOPSCH.

The defence of uncontrollable impulse is unknown to English law.

Application for leave to appeal against conviction, treated as a final appeal.

Applicant was convicted on October 19th, 1925, before Branson J., at the Central Criminal Court, of murder, and was sentenced to death.

St. John Hutchinson for the applicant, who was present. Applicant was convicted of the murder of a woman named Beryl Thornton, his uncle's wife, with whom he had been on affectionate and intimate terms. According to a statement which the applicant made on arrest, he and Thornton went to Ken Wood, Highgate, together one night, and at the woman's request applicant strangled her with his necktie. There was evidence that in doing so he acted under the direction of his sub-conscious mind, but the judge did not direct the jury, as is done nowadays, that a

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person who commits an act under an impulse which, by mental disease, he cannot control, is not criminally responsible for it.

Roome for the Crown was not called on to argue.

The LORD CHIEF JUSTICE: It has been suggested that when Mrs. Thornton asked the applicant to strangle her he lost his conscious mind and his sub-conscious mind took control of him. The jury came to the conclusion, as they could not fail to do, that the applicant was guilty of wilful murder. The Court has to-day had a repetition of an argument which from time to time is heard here, with an ingredient added that is not common, namely, that, according to the experience of counsel for the defence, His Majesty's judges are continually summing up to juries on the question of insanity in the way for which he has contended. That statement is surprising. No such summing-up is known to this Court. The law with regard to criminal insanity is that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury. To establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. In the present case the judge at the trial fully and clearly explained the law to the jury, but it is said that he misdirected the jury, as he omitted to direct them that "a person charged criminally with an offence is irresponsible for his act when it is committed under an impulse which the prisoner is by mental disease in substance deprived of any power to resist." In other words, the complaint against the judge is that he did not tell the jury that something was the law which was not the law. The argument of counsel for the defence began with the proposition that the law was as he represented, but, as it proceeded, drifted into the different position that the law ought to become, or ought to have become, what he represented. It is the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive. It is not yet part of the criminal

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law, and it is to be hoped that the time is far distant when it will be made so. The jury may well have thought that the defence of insanity in this case, as in so many cases, was the merest nonsense.

Application refused.

Solicitor for the Applicant—*Mark Lemon.*

G. B.

The same Court sat on November 10th.

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16 *November.*

ERNEST WAINWRIGHT.

The prosecution is not entitled to put in police photographs for the purpose of identification as part of the evidence in chief. Where identification has been obtained by means of such photographs, the facts of such identification ought not to be given in evidence.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on October 8th, 1925, before the Deputy-Recorder at Liverpool City Sessions, of warehousebreaking, and was sentenced to twelve months' imprisonment with hard labour.

J. W. Morris for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The evidence against the appellant was that of two women, one of whom lived opposite the warehouse which was broken into. They both purported to identify appellant as a man whom they had seen at the warehouse about the time that the crime was committed. At the trial counsel for the prosecution told the jury in his opening speech that an album of police photographs had been shown to the witnesses. The witnesses stated in evidence that they had had the album shown to them. The album was produced to them and was afterwards handed to the jury. The effect of these matters was that the jury were informed that appellant had been previously convicted. [He referred to *Goss*, 17 Cr. App. R. 196: 1923: c. q., and *Dwyer and Ferguson*, 27 Cox, C. C. 697; 18 Cr. App. R. 145; 132 L. T. 351; 89 J. P. 27; 41 T. L. R.

186, c. q.: 1924.] Moreover, the defence of appellant was never adequately put to the jury.

H. I. Nelson for the Crown. As appellant was undefended it was thought fair that all the circumstances of his identification should be before the jury. He referred to the headnote in *Dwyer and Ferguson,* Cr. Ap. R.

[The LORD CHIEF JUSTICE: That headnote is misleading].

The album was not put in evidence to strengthen the identification. It was shown to the jury opened at the material page; it was not examined by the jury.

The LORD CHIEF JUSTICE: The evidence against the appellant was that on Saturday, August 22nd, the warehouse of the Mersey Bedding Co., Liverpool, was locked up, and that a little later that day a hand-cart belonging to the company was left outside it. At 5.30 a.m. on August 24th a woman named Ellen Brett called for a friend, Florence McGowan, who lived almost opposite the warehouse. Miss Brett said that she saw the appellant standing with the hand-cart outside the warehouse, and that there were three sacks in it. Miss McGowan said that when Miss Brett called for her she opened the door and saw a man who was apparently locking the door of the warehouse and then went up the street. Later that morning the warehouse was opened and three bales of hair of the value of £12 were missing. On August 29th a detective sergeant, who had no idea who had committed the offence, showed an album of police photographs to Miss McGowan, and she picked out the photograph of the appellant. He also showed the album to Miss Brett with the same result. These facts were given with the album as evidence in chief against the appellant at the trial. On September 9th the appellant was arrested. He said that he knew nothing about the crime, and never left home before 9 a.m. He was put up for indentification. Miss McGowan picked him out, but Miss Brett failed to do so. At the police court, however, she said that she now identified him as the man she had seen at the warehouse on August 24th. At the trial she again said that the appellant was the man she had seen. At the trial both these witnesses

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were told to pick out the appellant's photograph, and apparently Miss Brett picked out a photograph which was not that of the appellant. Evidence was called for the defence that the appellant never left the house before 9 a.m., or, according to one witness, on several occasions before 8.15 a.m.

It is quite obvious, for a series of reasons which have been excellently marshalled by counsel, that this conviction cannot stand. The evidence identifying the appellant was most unsatisfactory. His defence was never really put to the jury. But the matter upon which it seems useful to dwell is that for some reason the prosecution adduced as part of its evidence in chief the fact that the appellant had been picked out by two witnesses in an album of police photographs. That album was produced and handed to the jury as part of the evidence in chief for the prosecution, and the two witnesses were required in Court again to pick out from that album the photograph of the appellant. It may well be that if counsel for the defence takes a certain course or asks certain questions, police photographs may have to be produced to the jury. But it is unheard of that police photographs, and the indentification of a defendant by means of them, should be put forward by the prosecution as part of its evidence in chief. It is manifest that this conviction cannot be supported.

Conviction quashed.

G. B.

WILLIAM BAGULEY.

On the trial of an indictment for receiving with guilty knowledge, the jury must be clearly warned that the contents of a statement made by the thief before the trial are not evidence against the defendant, and if the former is called at the trial before he is sentenced, there must be a careful direction on his testimony.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on October 8th, 1925, before the Recorder at Liverpool City Sessions, of knowingly receiving stolen goods, and was sentenced to nine months' imprisonment with hard labour.

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J. W. Morris for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The evidence against appellant was that a quantity of stolen goods was found in his house, and that a boy named Saunders said that a statement made by him in prison which implicated appellant was true. Appellant completely denied the statement, but it was read in Court without any explanation being given to the jury that it was not evidence against appellant except with reference to his demeanour when it was made. *Norton*, 1910, 2 K. B. 545; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550; 54 S. J. 602; 5 Cr. App. R. 65: c. q.; *Christie*, 1914, A. C. 545; 10 Cr. App. R. 141; 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 58 S. J. 515; 30 T. L. R. 471: c. q. Moreover, Saunders, who was called into the witness box by the Recorder, and who had then still to be sentenced, was not warned not to expect any favour from answering the questions put to him in a particular way, nor were the jury warned of the danger of accepting his evidence. The mere fact that property was found in the house where appellant lived was not in itself evidence that he received it, or, if he received it, that he knew that it was stolen. *Pratt*, 4 F. & F. 315: 1865.

[He was stopped.]

A. E. Griffith for the Crown. There was ample evidence to show guilty knowledge on the part of the appellant. The Recorder was justified in calling Saunders to refute a suggestion made by appellant that the police had manufactured the statement which Saunders was stated to have made.

The LORD CHIEF JUSTICE: The appellant was convicted on three counts of an indictment of receiving the proceeds of three shop-breakings. In the same indictment a boy, named Joseph Saunders, was charged with breaking into certain shops and stealing goods from them. To those charges Saunders pleaded "guilty," but when the appellant was on trial Saunders had not been sentenced. A younger boy, names Wilcox, was concerned in the shop-breaking, and was bound over at petty sessions. The whole question at the trial of the appellant was whether it was true to say that he had received the goods knowing them to

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have been stolen. Saunders had been arrested on July 24th. He was charged and admitted the commission of the offences. When Wilcox was arrested he also admitted his guilt, and he said that the "stuff" was at the appellant's house. The police, therefore, went there. It was found that in various places there was property which had undoubtedly been stolen by Wilcox and Saunders. The appellant said that he had not put the goods there, and that the boys had a free run of the house. Wilcox later confessed that he had put the goods in the appellant's room. After being arrested, Saunders made a statement in which he said that the appellant had hidden the stolen goods for Wilcox and him, and had said that he would give them some money when he had got rid of the property. When the appellant heard of that statement he said that it was false.

In that state of the evidence there were two matters with regard to which it was necessary to be very careful. One was to see that no misuse was made of Saunders's statement; the other was to ascertain with care what exactly was the case against the appellant apart from that statement. Saunders was called into the witness box while the question what sentence, if any, he was to receive was still in doubt, and he said that the statement was true. The case against the appellant was treated as being that which Saunders had made against him. The summing-up occupies something less than sixty lines, and in the course of it the jury were told that Saunders had nothing to gain by making a statement, that it would not make the remotest difference to any sentence which the Recorder might pass on him, but that he (the Recorder) had thought it more satisfactory to know what the boy said. The Recorder also said that the appellant knew perfectly well that the boys were putting stolen property about his house. In other words, the jury might think that they were being told that (i) the statement made by Saunders was evidence against the appellant and was true; (ii) it fitted in very well with the theory of the police, who (they were told) thought that the appellant was really the chief person in this business; and (iii) the appellant knew perfectly well that the two boys were putting stolen property about his house. What might have happened if this case had been properly conducted (for the force of the evidence is obvious) matters not. This conviction cannot stand, for it is impossible to say that, with a proper direction, the jury

must inevitably have come to the same conclusion and would have convicted the appellant. This conviction must therefore be quashed.

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Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE TALBOT.

FLORENCE IRENE CHICK.

1925
23 *November.*

Concealment of birth—Severity of sentence.

Appeal from order of Finlay J. refusing leave to appeal against sentence.

Appellant was convicted on October 16th, 1925, before Greer J. at Carnarvon Assizes, of infanticide and concealment of birth, and was sentenced to nine months' imprisonment.

Austin Jones for the appellant, who was not present. Leave to appeal against sentence is asked on the following grounds:—(a) The jury expressed a strong recommendation to mercy; (b) appellant was aged only twenty years; (c) before this offence she had borne an excellent character and was the daughter of most respectable parents; (d) she was alone at the time of the birth and received no assistance; (e) there was no evidence how long after the birth the piece of string with which the baby was strangled was tied round its neck; (f) the sentence was more severe than that usually passed by judges in cases of this character, even where the same mitigating circumstances did not exist, and, in particular, heavier than a sentence imposed in a similar case at Liverpool Assizes a few days after this case was heard at Carnarvon Assizes.

The Crown was not represented by counsel.

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The case was postponed till the end of the day's list, when the LORD CHIEF JUSTICE announced that the Assistant-Director of Public Prosecutions had had an opportunity of perusing the transcript of the shorthand note of the evidence, and the Court was now in a position to deal with the matter.

SANKEY J.: The appellant is only twenty years of age. On August 19th she gave birth to a child. No one was present at the birth, which took place in an attic at her home. On August 25th the body of the child was found in a river, where it had been put on the evening of August 19th by the father of the child, to whom the appellant had given it. The father was convicted of attempted concealment of birth and was bound over. No doubt it was a serious offence, but we have to consider all the circumstances of the case—the youth of the girl, the fact that this was her first offence, the strong recommendation to mercy by the jury—and in the circumstances the majority of this Court is of opinion that this sentence may be reduced, and that there be substituted for it a sentence of three months' imprisonment in the second division.

Sentence reduced.

Solicitors for the Appellant—*Robbins, Olivey and Lake,* for *Arthur Owen & Co.,* Pwllheli.

G. B.

ALFRED PEACE.

Severity of sentence in England following immediately on a sentence in Scotland.

Appeal against sentence.

Appellant was convicted on October 19th, 1925, before the Chairman at West Riding (Wakefield) Sessions, of housebreaking, and was sentenced to eighteen months' imprisonment with hard labour.

Appellant in person added nothing to his written statement.

The Crown was not represented by counsel.

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ALFRED PEACE.

Hewart L.C.J.

The LORD CHIEF JUSTICE: The appellant broke and entered a house on January 9th and stole two rings and some money. On January 24th he was sentenced at the Sheriff's Court, Dumfries, to nine months' imprisonment on another charge, the sheriff declining to take into account the offence committed in England on the ground that he could not deal with that matter in Scotland. After the appellant had served the sentence passed on him at Dumfries he was immediately re-arrested and charged in Yorkshire with the offence which is the subject of the present appeal. That course was contrary to the practice laid down in *Sullivan*, 6 Cr. App. R. 4: 1910, and a series of other cases. It is wrong to keep a charge hanging over a prisoner until his release from prison. If it is to be proceeded with it should be proceeded with diligently. Unfortunately also in this case the Chairman erroneously believed that a statement by the appellant that he had lived honestly from 1913 to 1922 was untrue, and that he had been convicted three times in 1914, twice in 1916, in 1917 and in 1919. If this sentence were allowed to stand the appellant would be called on to serve twenty-seven months' imprisonment with hard labour—eighteen months following on the nine months, after an interval spent in prison awaiting trial. The Court is of opinion that, if the offence in England had been taken into account in Scotland, a sentence of twelve months' imprisonment with hard labour for the two offences would have been adequate. The sentence of the appellant is therefore reduced to one of three months' imprisonment with hard labour.

Sentence reduced.

G. B.

JOHN JAMES HASLAM.

The police are not entitled to assist the identification of suspected persons already under arrest by showing photographs, including that of the suspect, to possible or likely witnesses against him.

Appeal against conviction and sentence.

Appellant was convicted on October 23rd, 1925, before the Chairman at West Riding (Wakefield) Sessions, of obtaining money and goods by false pretences, and was sentenced to three years' penal servitude.

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23 *November.*

JOHN JAMES HASLAM.

Hewart L.C.J.
Sankey J.
Talbot J.

Appellant in person.

Hinchcliffe, for the Crown, said that he found it difficult to support the conviction, but he asked the Court to take the view that no substantial miscarriage of justice had occurred, and to dismiss the appeal under the proviso to s. 4, sub-s. (1), of the Criminal Appeal Act, 1907.

The LORD CHIEF JUSTICE: Two matters emerge clearly in this appeal. First, witnesses who were called on to pick out the appellant at an identification parade as being the wrongdoer had previously been shown a photograph of him. It is not suggested that the photographs were shown to the witnesses that the police might obtain a clue to the direction in which enquiries might usefully be made, or to the person whom it would be proper to arrest. The appellant had already been arrested, and the effect of what was done was to give the witnesses—or certainly three of them—an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible. It cannot be right that when a witness, or a possible witness, is being called on merely to identify a person who is already arrested, that witness, before the identification, should be shown a photograph of the accused person. One can see that sometimes it will happen that when a person has been shown a photograph to assist in the arrest of a wrongdoer not yet arrested he may later give evidence of identification. That is a different thing from what happened here. In that case the person is asked to identify the accused person, notwithstanding the fact that he has previously seen a photograph. A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him.

That matter alone is sufficient to require this Court to quash the conviction. There is, however, another matter. The appellant put forward the defence of an *alibi*, and to establish it he caused certain inquiries to be made. He asked a detective inspector whether he would tell the jury where he stayed on the night of the crime. The answer, if the detective inspector knew it, was a certain place, but, not content with that, the inspector embraced the opportunity of endeavouring to launch a series of new charges against the appellant upon hearsay. That also was quite indefensible.

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If the evidence were such that, in spite of these solecisms, there was no miscarriage of justice, if it appeared that on a regularly conducted trial the jury would inevitably have come to the conclusion to which they did, the proviso to s. 4, sub-s. (1), of the Criminal Appeal Act, 1907, might apply. But the proviso is wholly inapplicable to this case, as both in the preparation and in the conduct of the case irregularities occurred which go to the root of the conviction. The conviction therefore must be quashed.

7 December.

I should like to refer in a sentence or two to the case of a man named John James Haslam, who on the 23rd of October of this year, was convicted at the West Riding Sessions upon certain charges of obtaining food and other property by false pretences; he was sentenced to three years' penal servitude, and appealed to this Court. On the 23rd November last his appeal was allowed, and his conviction was quashed.

Perhaps I might say that this is another of the cases which shows how useful it would be if a shorthand note was always taken of the judgments delivered in this Court.

The question at the trial was the question of identity, and from the transcript of the shorthand note it appeared that photographs had been shown by police officers to four persons, who afterwards became witnesses for the prosecution. The transcript of the shorthand notes did not show at what dates respectively those photographs were so shown to the witnesses. With regard to one of them, a vague phrase was used, "at a later date," but with regard to two of the witnesses there was no indication at all to be gathered from the transcript about the time when in relation to the appellant's arrest the photographs had been shown to the witnesses, and accordingly, in the course of the argument, this Court asked whether the prisoner was in custody at the time when the photographs were shown to these witnesses. The answer which was given to that question was: "Yes."

There was already another ground upon which it was necessary to allow the appeal and to quash the conviction, but that answer and those facts seem to supply yet the second ground. The Court is now informed that that answer "yes" was erroneous, and that in truth and in fact the photographs were shown to the persons who afterwards became witnesses not after the arrest of the appellant, but a considerable time before his arrest. To mention some of

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the dates, it was on the 5th May that food and lodging were obtained by false pretences from a Mrs. Cowley, of Greenfield, in Yorkshire, and on the 6th May the offender disappeared, and a complaint was made to the police. On the following day, that is on the 7th May, about a dozen photographs were shown, photographs of about a dozen different persons, by the police to three individuals, each of whom picked out a photograph of the appellant, and those persons afterwards became witnesses. On the 12th May those photographs were shown to another person who ultimately became a witness, but the Court is now informed that no photographs were shown after the 12th May to any person who became a witness in the case. It was not until the 17th June that the appellant was arrested in Leeds upon other charges. He was sentenced at Leeds on the 8th July in respect of those other offences, to twelve months' hard labour, and on the 2nd September there was what is called an identification parade with reference to the earlier charges, and then it was that the appellant was picked out by the four witnesses who had been shown the photographs so long before his arrest. In those circumstances it is apparent that no criticism is to be made upon the conduct of the police in relation to the showing of those photographs to those persons who afterwards became witnesses. It is satisfactory and reassuring to find that the facts are so, and not as they previously appeared to be. As I said, there was another ground upon which the conviction proved to be unsustainable; I need not repeat it. The question was asked by the appellant: "Will you tell the jury where I stayed on the night of the 6th?" In reply to that question, the police officer proceeded not merely to answer it, but to launch certain charges of a new kind against the appellant, one of them, obviously, upon hearsay evidence. It may be useful to add also, that in this case, as in another case which was recently before the Court, the learned counsel for the prosecution employed as part of the case for the prosecution the fact that photographs had been shown to these witnesses, which has the unfortunate effect of informing the jury that somebody, it does not need much imagination to guess who, had a photograph of the appellant, the prisoner, in his possession.

There is yet a further point in this case to which reference ought to be made. The sentence of twelve months' imprisonment which was passed upon that appellant at Leeds was not affected

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by the quashing of the conviction at Wakefield, but as soon as the appellant gave notice of appeal against the conviction at Wakefield, he ought to have been, and no doubt was, specially treated as an appellant under s. 14 of the Criminal Appeal Act, 1907, and that being so, from the moment the notice of appeal against the Wakefield conviction was given, the sentence, not only in that case, but also in the Leeds case, was in effect stayed, with the result that the time elapsing between notice of appeal and the final determination of the appeal could only be made to count towards either sentence by an order of this Court.

The appellant, instead of applying at the time during which he had been specially treated as an appellant should count as part of the sentence passed upon him at Leeds, made a frivolous application about the place to which a railway ticket should be procured for him, and entirely omitted to refer, nor did anybody refer, to the fact that this loss of time about his Leeds conviction had taken place. In truth and in fact, he had been in custody some four weeks, from the 26th October to the 23rd November, awaiting the result of the appeal, in which he was ultimately successful. Therefore, in substance, the question appears to be whether his frivolous application about the place to which he desired to be sent should deprive him of the benefit of an order which would in all probability have been made if the matter had, at the time, been brought to the notice of the Court. It is now brought to the notice of the Court, and we make now the order which we should then have made if the matter had been raised, and that is that the period of four weeks will count and will not be lost to the appellant

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN, AND MR. JUSTICE SANKEY.

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HAROLD HEWITT.

Whether on a sexual charge evidence of similar acts to that charged, alleged on a remote date as admissible, is in the discretion of the judge.

Appeal against conviction.

Appellant was convicted on November 6th, 1925, before Talbot J., at Nottingham Assizes, of having had carnal knowledge of a girl under the age of sixteen, and was sentenced to eighteen months' imprisonment with hard labour.

A. M. Lyons for the appellant, who was not present. Appellant was convicted of having had, on May 23rd, 1925, unlawful carnal knowledge of a girl aged fourteen years. At the trial a witness gave evidence that about four years before May 23rd, 1925, she had seen appellant indecently assaulting the same girl. This evidence was too remote to be of any value; it merely amounted to evidence of appellant's bad character; and it fell at least within the circumstances indicated by Isaacs C.J., in *Shellaker*, 1914, 1 K. B. 414; 83 L. J. K. B. 413; 110 L. T. 351; 78 J. P. 159; 24 Cox, C. C. 86; 30 T. L. R. 194; 9 Cr. App. R. 240, when he said that evidence of the previous conduct of the prisoner which tended to show that he had had connection with the girl more than six months before the commencement of the prosecution, although admissible, might be "of so little value and so prejudicial to the prisoner, or so remote" that the judge might think that it ought not to be given. If the judge in his discretion in the present case should have excluded the evidence, this Court will quash appellant's conviction. But, further, it is submitted that the evidence was not admissible. In *Shellaker*, on the authority of which case the

evidence in the present case was admitted, the evidence only referred to an act eleven months before the institution of the prosecution. Here the alleged act was about four years previously, and a line must be drawn somewhere. He also referred to *McDonell*, 5 Cox, C. C. 153, 1850; and *Ollis*, 1900, 2 Q. B. 758; 69 L. J. K. B. 918, per Channell J.

Percival Clarke and *Allsebrooke* for the Crown were not called on to argue.

The LORD CHIEF JUSTICE: This appellant, Harold Hewitt, was convicted at Nottingham Assizes upon an indictment which charged him with unlawful carnal knowledge of a girl between the ages of thirteen and sixteen years, between May 23rd and June 14th of this year, and also with indecent assault. The appellant was sentenced to eighteen months' imprisonment with hard labour, and he now appeals against his conviction on grounds involving questions of law and applies for leave to appeal against conviction and sentence.

The child whom the appellant was charged with assaulting was a little girl who was born on May 8th, 1911. Five years ago the appellant married her sister. The evidence of the child was that four years ago the appellant had had connection with her and that afterwards on many occasions he indecently assaulted her and had connection with her; and in particular she said that her mother went to Brighton on May 23rd, and in the absence of the mother the appellant had connection with her on three occasions. In other words, the child was saying that what happened on and shortly after May 23rd was the culmination of a long series of similar attempts made upon her by the same man. On one occasion about four years ago, while the appellant was committing an indecent assault upon this child, if the evidence was accepted, a neighbour, a Mrs. Bettinson, came to the window and saw what was occurring, and Mrs. Bettinson's evidence to that effect was upon the deposition.

While counsel for the Crown was opening the case, counsel for the prisoner intervened and said that he would object to the evidence of what took place outside the offences charged in the indictment, a phrase which, of course, presupposed in a particular way the answer to the question which was about to be sub-

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mitted to the learned judge. The jury retired, and the question was thereupon argued before the learned judge. The argument for the defence the judge did not accept, and in the end he said that, although he thought it was perhaps a border-line case, the evidence was admissible.

The case that was referred to is familiar in this class of case —that of *Shellaker*. It is quite true, as was pointed out in that case, that there may be circumstances in which it is right to exclude such evidence in the discretion of the judge. I need not read the principle, but the commentary upon the principle was expressed in these words: "It is quite easy to put cases where the application of this principle might cause hardship to the prisoner, but such cases might come within the class in which, though in strictness the evidence is admissible, the judge may be of opinion that it is of so little value and yet indirectly so prejudicial to the prisoner, or that it is so remote, that it ought not to be given. That, however, does not affect the general principle."

It is said that here the lapse of time was greater than the lapse of time in *Shellaker* (*supra*). That is quite true, but that goes to the weight of the evidence; it does not go to its admissibility. And it is to be observed that the evidence in this case leading up to the events of May 23rd and the following days was not that there was an isolated incident of four years ago, but that on a whole series of occasions this appellant had made similar attempts upon this same girl. It is not possible for this Court to say that in admitting the evidence the judge made an error in point of law. What was the weight to be attached to the evidence was essentially a question for the jury.

It is further complained that evidence was given of a statement made by the appellant when the warrant was read over to him. It is said that that statement was not relevant to any issue in the case, but, on the contrary, was well calculated to prejudice the fair trial of the appellant. What the appellant said was this. The warrant, of course, named a particular date, and the appellant in reply said: "I do not remember that date. I told the old woman to get on with the job. I admit once having her on my knee, and messing her about with my hand. She was always getting on my knee. I do not admit doing anything else." There is no conceivable ground upon which it can be urged that

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that statement was not admissible. What it meant and what its application was to the facts deposed to in evidence were questions for the jury. In the opinion of the Court this appeal on both grounds fails and is dismissed.

Appeal dismissed.

G. B.

Solicitor for the Appellant—*J. Carnegie,* for *Arthur F. Heane,* Nottingham.

HENRY WILLIAMS.

If a defendant is wrongly denied his right to challenge, the Court will award a venire de novo.

Appeal against conviction by leave of the Court.

Appellant was convicted on October 20th, 1925, before the Deputy-Chairman, at Surrey Sessions, of housebreaking, and was sentenced to four years' penal servitude.

Christmas Humphreys for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was deprived of his right to challenge jurors at his trial. He challenged a woman juror, and, when asked why he had done so, he said that it was because she was a woman. The fact that he gave a frivolous reason did not matter because he was charged with felony and need not have given any reason at all. [He was stopped.]

Percival Clarke (with him *J. Campbell*) for the Crown. No doubt the appellant had the right to challenge jurors without giving any reason, and he has been deprived of it.

The LORD CHIEF JUSTICE: This is a clear case. The appellant was entitled to challenge jurors and he need not have given any reason for doing so. His challenge was ignored. Counsel for

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the Crown very properly admits that that proceeding cannot be supported. In *Crane*, 1921, 2 A. C. 299; 90 L. J. K. B. 1160; 125 L. T. 642; 85 J. P. 245; 15 Cr. App. R. 183; 37 T. L. R. 788, the House of Lords held that this Court in certain circumstances has power to order a new trial where proceedings have been a nullity. This is such a case, and we make an order accordingly (*a*).

Venire de novo awarded (*b*).

G. B.

GEORGE WILLIAM McCRAIG

It is improper, in cross-examining a witness for the defence, to put questions tending to show that a prisoner whose character was not in issue has been on trial before.

Appeal against conviction and sentence.

Appellant was convicted on October 28th, 1925, before the Deputy-Chairman, at London County Sessions, of having been found by night in a building with intent to commit a felony, and was sentenced to three years' penal servitude.

Beaufoi Moore for the appellant, who was present. After appellant had given evidence on his own behalf at his trial, his counsel called a witness named McCartney, who gave certain evidence in appellant's favour. Counsel for the prosecution then cross-examined McCartney, and, in the course of cross-examination, asked the following questions, to which McCartney's answers are appended:—

"Whom did you give evidence for last time you gave evidence? . . . Was it McCraig?—I gave evidence for McCraig.

"You gave evidence in this Court last time for McCraig?—Yes.

"He was found in someone's room, was not he?—Yes, I think he was.

"In the middle of the night, in a house?—Yes."

(*a*) For the form, see *W. Baker*, 7 Cr. App. R. 218 : 1912.
(*b*) Not technically, but in effect.—ED.

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When this cross-examination was objected to, counsel for the prosecution said that it was not directed against the prisoner's character, but that he wanted the jury to understand that the witness "by some marvellous coincidence was in a position to give evidence for McCraig in two trials." The cross-examination, however, was tantamount to giving evidence of the appellant's bad character. [He was stopped.]

Ronald Powell for the Crown. Although from the point of view of expediency and practice it might have been better not to put these questions, yet they were proper as they went to the witness' credit and not the character of the prisoner. If a cross-examination is otherwise proper, the mere fact that it results in an imputation being cast on the prisoner's character does not render it improper. He referred to *Annie Lovegrove,* 1920, 3 K. B. 643; 90 L. J. K. B. 285; 124 L. T. 288; 85 J. P. 75; 15 Cr. App. R. 50; 26 Cox, C. C. 683.

The LORD CHIEF JUSTICE: This appellant was convicted at the London Sessions upon an indictment which charged that he and a man named William Gray were, in the night of October 6th of this year, found in a certain building, the Grosvenor Hotel, with intent to commit a felony therein. Gray was bound over, and the appellant was sentenced to three years' penal servitude. The appellant now appeals against that conviction and sentence.

It is not necessary to review the facts of the case. I will only say that there was a question, by no means free from difficulty, who was the person in a certain room, and it is quite evident that the view was taken that that person was the appellant. But in the course of the cross-examination of a witness named McCartney, who gave evidence for the defence, questions were put—I need not repeat them in full—to this effect: "Have you given evidence in this Court before? Whom did you give evidence for last time you gave evidence?" The witness protested against that question: "Have I got to answer that question?" He was told that he had. Then: "Was it McCraig?" that is the appellant. He answered: "I gave evidence for McCraig" Q. "You gave evidence in this Court last time for McCraig?"—A. "Yes." Q. "He was found in someone's room, was not he?"—A. "Yes,

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I think he was." Q. "In the middle of the night, in a house?" —A. "Yes." Then a little later, when the question arose for what purpose those questions had been asked, cross-examining counsel said: "I just want the jury to understand that this witness, by some marvellous coincidence, was in a position to give evidence for Mr. McCraig in two trials."

It seems pretty clear, when one looks at the shorthand note, how these questions came to be asked. There was a point whether the witness had been sitting in Court when he ought to have been out of Court, and he ought to have known that he ought to have been out of Court. But, however that may be, it is quite obvious that, on the mind of any juryman of average intelligence, these questions might well have left the impression that the prisoner was an experienced hand at this kind of crime; that he had done exactly the same sort of thing before; that he had been charged with it, and that he had got out of that charge improperly because of the false evidence of a tame witness kept by him for need in emergency—this man McCartney. If the jury did get that impression, it might very well strengthen any view they had about the prisoner's guilt. In the opinion of the Court, these questions, whatever may have been in fact the explanation of their being asked, were quite inadmissible, and it is not possible to say that, but for this incident, the jury would certainly or must inevitably have come to the conclusion to which they came.

The result is to show nothing about the merits of this appellant, but only to show how necessary it is in the conduct of a criminal case that well established rules should not be transgressed. In these circumstances, though with great reluctance, the Court has come to the conclusion that this conviction cannot stand, and the appeal must be allowed. The conviction is quashed.

Conviction quashed.

G. B.

Solicitors for the Appellant—*Appleton & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

ARTHUR STOKES.

1925
17 *December.*

A verdict of common assault cannot be found on an indictment for attempted murder or for shooting with intent to do grievous bodily harm.

Appeal against conviction.

Appellant was convicted on November 16th, 1925, before Roche J. at Stafford Assizes, of common assault, and was sentenced to eleven months' imprisonment with hard labour.

H. H. Maddocks for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The indictment on which the appellant was arraigned charged him in the first count with attempted murder, and in the second count with shooting with intent to do grievous bodily harm. He pleaded "Not Guilty," and the trial proceeded. Just before the close of the case for the prosecution the judge suggested that, even if the defence established all that had been outlined in cross-examination, appellant would still be guilty of a common assault, and would be liable to be convicted of it on the indictment. The trial continued, and after evidence for the defence, including that of appellant, had been called there was an adjournment, immediately after which appellant said that he would plead "Guilty" to a common assault. The plea was accepted as he was convicted on it. That conviction was bad because such a verdict could not be found on that indictment.

[He was stopped.]

John Wylie for the Crown. I do not see how I can support this conviction, but I submit that the Court will order a *venire de novo*. There has never been a real, complete trial—or, as Lord

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Sumner said in *Crane*, 1921, 2 A. C. 299; 90 L. J. K. B. 1160; 125 L. T. 642; 85 J. P. 245; 37 T. L. R. 788; 15 Cr. App. R. 183, a "true legal trial"—of appellant, who has never been in peril because the case never went to the jury.

The LORD CHIEF JUSTICE: The question raised by this case is whether it is possible to enter a verdict of "Guilty" of common assault upon such an indictment as that upon which the appellant was arraigned. Counsel for the appellant has contended that that is impossible, and counsel for the Crown has admitted that that is so. Reference may be made to the well-known judgment of the Court for Crown Cases Reserved in the year 1875 in *R.* v. *J. H. Thomas*, L. R. 2; C. C. R. 141; 44 L. J. M. C. 42; 13 Cox, C. C. 52: c. q.; see also *R.* v. *Woodhall*, 12 Cox, C. C. 240: 1872: c. q. The rule is that, apart from statute, a defendant cannot, on an indictment for felony, be convicted of a misdemeanour, though all the ingredients of the misdemeanour may be involved in the charge of felony. In these circumstances this appeal must be allowed. And there, so far as this Court is concerned on the present occasion, the matter ends.

Conviction quashed (*a*).

G. B.

The Court (Sankey, Salter and Swift, JJ.) also sat on December 21st.

(*a*) This case appears to overrule *O. M'Loughlin*, 8 C. & P. 635: *per* Coleridge J. (Bosanquet and Coltman, JJ. being present): 1838: (wounding with intent to murder): *St. George*, 9 C. & P. 483: *per* Parke B.: 1840: (feloniously attempting to discharge loaded arms): *Barnett, &c.*, 2 C. & K. 594: 1848: *per* Cresswell J.: (robbery with violence)—in all of which a verdict of assault was returned.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE ACTON.

ROBERT EDWARD CHEW.

1926
18 *January.*

When an alibi *is set up as a defence, the jury must be directed that if it fails they must consider the facts of the case on their merits.*

Appeal against conviction.

Appellant was convicted on September 26th, 1925, before the Deputy-Chairman, at Middlesex Sessions, of workshop-breaking, and was bound over.

Bertram Long, for appellant, who was not in custody. The conviction of appellant should be quashed, since the evidence of identification was unsatisfactory. In addition, a statement was obtained from him by the police without any caution having been given him, he was improperly cross-examined with regard to his character, and passages in the summing-up might have led the jury to suppose that it was for him to establish that he was not guilty.

Samuel Moses for the Crown. If the summing-up be taken as a whole, the Deputy-Chairman adequately pointed out that the *onus* of proof fell on the prosecution.

The LORD CHIEF JUSTICE: The whole question at the trial of the appellant was one of identity. His counsel has directed our attention to various differences in the evidence of identification, and it is enough to say that that evidence was not very satisfactory. The defendant tried to prove an *alibi,* but it is evident from the result of the trial that the jury did not accept it. No

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criticism can be made of the passages in the summing-up where the Deputy-Chairman said that the jury had to be satisfied that the *alibi* had been made out, but there was the further question whether, if it had not been, the case for the prosecution had been established, and one looks in vain for a direction to the jury that, if in their opinion the defence of *alibi* failed, the prosecution did not necessarily succeed. On the contrary, there are some passages in the summing-up where the contrary view seems at least to have been suggested. Those passages, taken by themselves, clearly put the burden on the defence, but again there are other passages to the opposite effect. If the evidence for the prosecution had been stronger the form of the summing-up might not have mattered, but, as it is, the conclusion to which the Court is impelled is that the conviction is unsatisfactory and must be quashed.

Conviction quashed.

Solicitor for Appellant—*H. C. L. Hanne.*

G. B.

SAMUEL GUMBS.

Severity of sentence.

It is a general principle that on conviction after previous convictions, even if any of them have led to long terms of sentence, sentence must depend on the nature of the offence and need not necessarily be for a long term.

Appeal against sentence.

Appellant was convicted on December 14th, 1925, before the Recorder, at Manchester City Sessions, of obtaining money by false pretences, and was sentenced to five years' penal servitude.

Appellant in person.

The Crown was not represented by counsel.

The LORD CHIEF JUSTICE: The appellant obtained certain small sums of money, £7 13*s.* 4*d.* in all, in November, 1925, and there was also a charge against him of obtaining credit by fraud at Bournemouth last year. He was aged thirty-six years, and he

had been previously convicted on three occasions—in 1904, 1912 and 1922. He was released from his last conviction on December 16th, 1924. Two principles from time to time have been mentioned in this Court, and in some cases they may have to be considered together. One is that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed a somewhat different sentence; for this Court to revise a sentence there must be some error in principle. Secondly, when a man has committed serious offences and has served long terms for them, it is not required that he should suffer further severe punishment for a later offence which does not intrinsically call for it. In all the circumstances of the present case the Court thinks that this sentence should be reduced to one of eighteen months' imprisonment with hard labour.

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Sentence reduced.

G. B.

BEFORE

1 *February.*

THE LORD CHIEF JUSTICE, MR. JUSTICE GREER, AND MR. JUSTICE ACTON.

HAYLEY MORRISS.

It is not contrary to law to pass a sentence of imprisonment consecutive on one of hard labour.

Application for leave to appeal against conviction and sentence.

Applicant was convicted on December 17th, 1925, before Avory J., at Lewes Assizes, of (a) having had unlawful carnal knowledge of girls under the age of sixteen, and (b) conspiracy, indecent assault, and common assault. He was sentenced on (a) to two years' imprisonment with hard labour, and on (b) to a consecutive sentence of twelve months' imprisonment. He was also ordered to pay £1,000 towards the costs of the prosecution.

Roland Oliver, K.C. (with him *Sir John Hutchinson*), for the applicant, who was present, in dealing with the question of

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HAYLEY MORRISS.

Hewart L.C.J.
Greer J.
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sentence. The sentence passed on the applicant was improper. The accepted policy of the legislature has for some time been that in no circumstances shall a convict be imprisoned, as distinct from being kept in penal servitude, for more than two years. In every recent statute it is provided that a person found guilty of the offence specified may be sentenced "to be imprisoned for any term not exceeding two years, with or without hard labour," or words to that effect. Where formerly offences could be punished by sentences of more than two years' imprisonment, recent legislation has altered the position. (See, for example, s. 3 of the Libel Act, 1843, which was replaced by s. 31 of the Larceny Act, 1916; and s. 2 of the Perjury Act, 1729, which was replaced by s. 1 of the Perjury Act, 1911.) The Penal Servitude Act, 1891, by s. 1, sub-s. (2), crystallises the position in cases where the Court can pass a sentence of penal servitude by providing for the passing of alternative sentences of imprisonment "for any term not exceeding two years," and the position is the same where no alternative sentence of penal servitude is possible. Many of the gravest offences, *e.g.*, attempt to murder, arson, &c., which are punishable with penal servitude for life, limit imprisonment to two years. This Court has laid it down that consecutive sentences of imprisonment with hard labour amounting in their sum to more than two years should not be passed (*Goldstein*, 11 Cr. App. R. 27: 1914: c. q.; *Borham*, 87 J. P. 140; 13 Cr. App. R. 191: 1918: sen. red.; and *Hughes*, 17 Cr. App. R. 127: 1923: sen. red.), and the same principle must be applied to the sentence passed on the applicant because, in practice, there is but a negligible difference between imprisonment and imprisonment with hard labour.

The Attorney-General (with him *Sir Edward Marshall Hall, K.C.*, and *John Flowers*), for the Crown. The sentence was proper as well as being legal. The Penal Servitude Act, 1891, does not have the effect contended for; it is simply an Enabling Act empowering judges to give sentences of imprisonment for offences for which penal servitude can be given where, owing to mitigating circumstances, a shorter sentence is required than that which is regarded as a proper minimum of penal servitude. The cases cited refer to consecutive sentences of imprisonment with hard labour and not to consecutive sentences of imprisonment

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with and imprisonment without hard labour, and they are, therefore, distinguishable. He referred to *Delcanho*, 1924, 18 Cr. App. R. 61: 1924.

The LORD CHIEF JUSTICE, having dealt with other matters raised by the application, continued: If the sentence of the applicant were to be reviewed it would be reviewed only in the direction of an increase. A more appalling case of this kind is not within the recollection of the Court. It has been said that an inference can be drawn from certain statutes that the Court should not pass a sentence of imprisonment to run consecutively to a sentence of two years' imprisonment with hard labour. Those statutes do not justify that inference. Three cases were relied on as showing that, although in law it may be competent for a judge to pass a sentence of imprisonment to be consecutive to one of two years' imprisonment with hard labour, such a course is against the settled practice of the Court. It is important to have regard to the facts of those cases and the guarded language there used. It need only be said that this Court has not laid down the doctrine that a sentence of simple imprisonment can never be given consecutively to a sentence of two years' imprisonment with hard labour. If the law had permitted it the appellant merited a long sentence of penal servitude. Indeed, his learned counsel frankly admitted that if the law had in this case permitted a sentence of ten years' penal servitude, and if that sentence had been passed, he would have had nothing to urge against it. It can only be hoped that before a case of these dimensions can again come for trial the legislature will have removed a blemish from penal legislation and have given a discretion where a multiplicity of offences of a certain kind has been committed to impose a sentence of penal servitude.

Application refused.

Solicitors for the Applicant—*Withers & Co.*

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In 61 & 62 *Vict. c.* 36, *the Criminal Evidence Act,* 1898, *the words "imputations on the character" in s.* 1 (*f*) (*ii*), *include, at any rate, a defence that a witness is committing perjury for the purpose of revenge.*

Appeal against conviction and sentence.

Appellant was convicted on December 12th, 1925, before the Deputy Chairman, at the County of London Sessions, of receiving stolen goods, and on December 13th, 1925, he was sentenced to fifteen months' imprisonment with hard labour.

R. E. Seaton, for the appellant, who was present. On October 20th, 1925, a warehouse was broken into and some accumulators, an accumulator charger, and other goods were stolen. At the trial a witness named Ellen Maud Smith said that subsequently appellant had called on her and offered the accumulators and the charger for disposal by her husband. In cross-examination it was suggested to her that she had invented her story because she had a grievance against appellant, as he had caused her brother to be "put away" for housebreaking some years previously. That she denied. Appellant, in evidence, said that he did not take the property to Mrs. Smith's, and he suggested that she had made her statement in malice for the reason stated. Cross-examined, he said that Mrs. Smith had deliberately concocted the story to do him damage. Counsel for the prosecution then obtained leave to cross-examine appellant with regard to his character, and five previous convictions of crimes of dishonesty were put to him. It is submitted that there was no such imputation on the character of Mrs. Smith, a witness for the prosecution, as justified appellant being so cross-examined under s. 1 (f) (ii) of the Criminal Evidence Act, 1898. To enable a defendant to be cross-examined under paragraph (ii) there must have been an attack on the *general* character of the prosecutor or his witness independent of the defence, or of the necessity for developing the defence. Here it was merely suggested that Mrs. Smith was lying for a motive connected only with the present case; there was no attack on her general character. He referred to *Rouse,* 1904, 1 K. B. 184; 78 L. J. K. B. 60; 89 L. T. 677; 68 J. P. 14; 20 T. L. R. 68; *Bridgewater,* 1905, 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T.

838; 69 J. P. 26; 21 T. L. R. 69; *Preston*, 1909, 1 K. B. 568; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 25 T. L. R. 280; 2 Cr. App. R. 24; *F. Wright*, 5 Cr. App. R. 131: 1910; *Wil. Jones*, 87 J. P. 147; 39 T. L. R. 457; 17 Cr. App. R. 117: 1923.

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The LORD CHIEF JUSTICE referred to *G. Roberts*, otherwise *Spalding*, 37 T. L. R. 69; 15 Cr. App. R. 65: 1920.

G. L. Bannerman, for the Crown. An imputation on the character of a witness for the prosecution within s. 1 (f) (ii) of the Act of 1898 is not to be confined to an imputation on the general reputation of that witness. The word "character," when applied to defendant in paragraph (ii), can properly be given a different meaning from that given to it when it is applied to a witness for the prosecution. If there is any element beyond defendant's saying that the evidence of a witness for the prosecution is a deliberate lie there may be ground for his being cross-examined with regard to character, even if that element is concerned with the conduct of the particular case.

The LORD CHIEF JUSTICE referred to *Rowton*, L. & C. 520; 34 L. J. M. C. 57; 11 L. T. 745: 1865.

The LORD CHIEF JUSTICE: This appellant was indicted at the County of London Sessions for breaking and entering a warehouse and stealing and receiving certain property in that warehouse. He was convicted of receiving, and was sentenced to fifteen months' imprisonment with hard labour. He now appeals against both the conviction and the sentence.

The facts as shown by the evidence were, shortly, that in the early morning of October 20th of last year a warehouse in Liverpool Road was broken into. The safe was taken from the office into the basement and was broken open, and a "Valley" charger and an accumulator belonging to the occupier of the warehouse, a Mr. Fennimore, were stolen, as also was a bicycle belonging to a Mr. Polinsky. Ten days later, namely, on October 30th, a police sergeant saw appellant in Islington with Mr. Polinsky's bicycle. Appellant said that it belonged to him, that he had had it for fourteen months, and that he had bought it at the cattle

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market for 4*l.* 10*s.* He was charged with the unlawful possession of the bicycle, and he said: "I did not steal the bicycle, but a chap I know stole it. I have had it about three weeks. He owed me some money, and he gave me the bicycle." On the following day appellant was charged at the police court with unlawful possession. He was remanded for a week in custody. On November 7th he was released on bail. Seven days later a charge of warehouse breaking was substituted for unlawful possession, and he was kept in custody. At the trial evidence was given of the breaking of the warehouse, of the larceny from the warehouse, of the finding of appellant in possession of the bicycle, and of his contradictory statements about that possession. A Mrs. Smith, who had given evidence at the police court, went into the box and said that she was the wife of Albert Smith, and that they carried on the business of general dealers in Holloway. She said that she had known appellant for ten years, and that he took Mr. Fennimore's charger and accumulator to their house and asked her whether her husband would dispose of them for him. She said that she told him that she would ask her husband when he came from hospital. That conversation, she said, took place in November, though she could not give the exact date. She added that on November 13th, when appellant was on bail, he sent for her, and, to quote her words, "wanted me to say he was not the young fellow who called with the stuff." That invitation, she said, she declined, saying that she had already made her statement, and, indeed, on the following day, she gave her evidence at the police court. Thereupon Mrs. Smith was cross-examined by counsel who then appeared for appellant, and it was suggested to her that her story was a pure invention fabricated because she had, or thought she had, a grievance against appellant about her brother. The suggestion was that her brother, who is serving a sentence of three years' penal servitude for coining, and five years' preventive detention to follow, had, as she believed, been "given away" by the prisoner, and that, therefore, she had invented this story against the prisoner. She denied that she had any grudge against appellant, and she said: "He suffered his punishment the same as my brother did." Later, appellant himself went into the witness box, and he said that Mrs. Smith's evidence was not true, that he had never taken the things to her house, and that her story was due to malice because she thought

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he had given her brother away when he was convicted of housebreaking seven years ago. With regard to the bicycle, appellant said that Mrs. Smith's husband had given it to him about October 24th because he owed him some money, and he said he did not tell the detective of that fact because he wanted to keep Mr. Smith out of the Court. He also denied the statement of Mrs. Smith that he paid her a visit while he was out on bail.

In view of those questions which had been put to Mrs. Smith, and those statements which had been made by appellant about her in his evidence, he was allowed to be cross-examined as to character. Apparently, the ground upon which it was said that that cross-examination was permissible was that he had chosen to put his character in issue. Perhaps it would have been more accurate to say that the ground upon which the cross-examination was permitted was that the nature, or at any rate the conduct, of the defence had been such as to involve imputations on the character of a witness for the prosecution. Being cross-examined, appellant admitted that he had been bound over in 1915 and 1917 for larceny, that he had suffered eighteen months' imprisonment with hard labour, and then, in January, 1920, had been convicted again, and had had three months in 1922 for loitering. He called two witnesses and sought to set up an *alibi*. In the result, the count for receiving was left to the jury, and the jury convicted appellant.

In those circumstances appellant comes to this Court to say, so far as the conviction is concerned, that the cross-examination of him about his antecedents ought not to have been permitted, inasmuch as nothing had been done to bring his case within the statute which, in certain circumstances, permits such cross-examination. The question is whether that contention is right. It may be convenient to read once more the words of the Criminal Evidence Act, 1898. By s. 1 of that Act it is provided that "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person"; and there follows a proviso, paragraph (f) of which is as follows: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or

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been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." It is apparent that within the space of a very few lines this part of this section uses the word "character" no fewer than four times. It is also apparent that the imputations which are spoken of in the closing words of the passage I have read are described not as imputations on the prosecutor or the witnesses for the prosecution, but imputations on the character of the prosecutor or the witnesses for the prosecution. In those circumstances it is not difficult to suppose that an argument, and a formidable argument, might have been raised on the phrasing of this statute, that the character which is spoken of is the character which is so well known in the vocabulary of the criminal law, namely, the general reputation of the person referred to; in other words, that "character" in that context and in every part of it, in the last part no less than in the first, in the third part no less than in the second, bears the meaning which the term "character" was held to bear, for example, in the case of *Rowton*, where the question was considered by the Court for Crown Cases Reserved. Nevertheless, when one looks at this long line of cases beginning very shortly after the passing of the Criminal Evidence Act, 1898, it does not appear that that argument has ever been so much as formulated. It was formulated yesterday. One can only say that it is now much too late in the day even to consider that argument, because that argument could not now prevail without the revision, and indeed to a great extent the overthrow, of a very long series of decisions. When one looks at the mass of authority to which we have been referred, whatever may be the merits of the more fundamental argument to which reference has been made, it is apparent that the statement on behalf of this prisoner, and the suggestions made on his behalf in cross-examination, to the effect that Mrs. Smith's evidence was not merely a pure invention, but was due to malice towards him arising out of a grievance imputed to Mrs. Smith about a previous and wholly unrelated episode in which appellant and her brother were con-

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cerned, were imputations that went sufficiently far to permit the kind of cross-examination of which appellant complains. It is not possible to lay down, even if it were desirable, as the authorities stand, a series of *formulæ* or regulations upon this matter. At some time, perhaps upon a slightly different case, an opportunity may arise for further and better investigation of a really interesting and important point, and a point, it may be, upon which further investigation and a statement of a clear and universal *ratio decidendi* may be desirable. For the purposes of this appeal it is enough to say that, according to a considerable line of authority, that which is here complained of was within the limits of the law. Apart from that legal question, it is abundantly clear that there are no merits in this appeal. The evidence was overwhelming, and, indeed, one cannot help thinking that counsel for the prosecution would be well advised, even where the occasion for such cross-examination appears to arise, to refrain from embarking upon it unless the circumstances are such as to make it appear to the mind of the learned counsel to be a positive duty that he should enter upon that somewhat invidious task.

With regard to the sentence, appellant was sentenced to fifteen months' imprisonment with hard labour, in a bad case of receiving stolen property, well knowing it to have been stolen. It is quite true that he is a young man, but this is nothing like his first offence. He had two chances given him. He was bound over on two occasions, and he has already, since then, served two sentences of imprisonment, one of them being a sentence of eighteen months' hard labour for housebreaking. In these circumstances this Court sees no reason to interfere either with the conviction or with the sentence, and the appeal is dismissed. Inasmuch, however, as leave to appeal was given, the sentence will run not from this day, but from the date of conviction.

Appeal dismissed.

Solicitor for Appellant—*J. Albert Davis.*

G. B.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE McCARDIE, AND MR. JUSTICE GREER.

HERMAN PHILIP ERIKSEN MILLER.

There ought not to be a suggestion from the Bench that a defendant on trial has previously appeared in a criminal Court.

Appeal against conviction and sentence.

Appellant was convicted on January 11th, 1926, before the Chairman of the Lancashire (Salford Hundred) Quarter Sessions, of larceny and housebreaking, and was sentenced to fifteen months' imprisonment with hard labour.

John Maude for the appellant, who was present. There were several irregularities at the trial, the principal being that when appellant wished to give evidence on his own behalf, the following observation was addressed to him from the Bench: "You know, we have met before." [He was stopped.]

Ronald Powell for the Crown. The observation referred to cannot be supported. It is submitted, however, that that statement added nothing to the facts which appellant afterwards elicited from his co-defendant, and that there has been no substantial miscarriage of justice.

The LORD CHIEF JUSTICE: It is enough to say that inadvertently, no doubt, certain irregularities were permitted at the trial, and in particular words were employed from the Bench which might convey to the jury the impression that the appellant was experienced in crime and used to the task of defending himself in criminal Courts. It is not possible to say what effect that observation had on the subsequent course of the trial and on its

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result. The rule of this Court is that where such an irregularity has been permitted, the conviction must be quashed, unless it clearly appears that, in the absence of that irregularity, the jury would inevitably have arrived at the same conclusion. Whatever, therefore, may be the merits of this appellant, in view of what has taken place at the trial, this conviction must be quashed.

Conviction quashed.

G. B.

EDWARD LEATHERLAND.

Severity of sentence in view of youth and previous record.

Appeal against sentence.

Appellant was convicted on January 4th, 1926, before the Chairman at the Nottinghamshire Quarter Sessions, of larceny in a dwelling-house, and was sentenced to two years' imprisonment with hard labour.

Appellant in person.

No counsel appeared for the Crown.

The LORD CHIEF JUSTICE: This appellant has been at Borstal, and has also served a sentence of three months' imprisonment with hard labour, but he is only twenty-five years of age and we think, having regard to his record and his age, and to the circumstances of this case, that this sentence should be reduced to one of twelve months' imprisonment with hard labour. As we have modified the sentence, it will run from the date of conviction.

Sentence reduced.

G. B.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER, AND MR. JUSTICE BRANSON.

JABEZ DRIVER.

Severity of sentence.

Appeal against sentence, and application for leave to appeal against conviction.

Appellant was convicted on January 8th, 1926, at the Northampton Quarter Sessions, of causing bodily harm by the wanton driving of a trap, under s. 35 of the Offences against the Person Act, 1861, and was sentenced by the Chairman to nine months' imprisonment with hard labour.

Maurice Healy (with him *Geoffrey Smallwood*) for the appellant, who was present. "Wanton," in sect. 35, does not necessarily mean "wilful."

R. C. Vaughan for the Crown.

The LORD CHIEF JUSTICE: With regard to the sentence passed on this appellant, there is no previous conviction against him worth taking into account. He is a farmer of fifty-two years of age, and any conviction recorded against him is of a trivial nature, and may be disregarded. Looking at his character and antecedents, we are of opinion that the sentence may properly be reduced to four months' imprisonment in the second division.

Sentence reduced.

T. R. F. B.

Solicitors for Appellant—*Douglas and Trasler*, Market Harborough.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE FINLAY.

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CHARLES FIELDER.

Reduction of term of sentence in order to carry out intention of the trial judge.

Appeal against sentence.

Appellant was convicted on January 26th, 1926, before Swift J., at Liverpool Assizes, of bigamy, and was sentenced to eleven months' imprisonment, partly concurrent with and partly consecutive to a sentence which he was already serving.

J. M. Helme for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The bigamy of which appellant has been convicted was committed on March 25th, 1920. In 1923 he committed the offence of obtaining money by false pretences. On December 17th, 1925, he was sentenced at the Liverpool Petty Sessions, for the latter offence, to six months' imprisonment. On January 26th, therefore, when he pleaded guilty to the charge of bigamy, he had served a little more than one month of that sentence. The offence of obtaining money by false pretences consisted in appellant's obtaining an allowance from the Army authorities in respect of the woman with whom he had committed bigamy and her child, and Swift J. took the view that that offence and the bigamy had arisen out of the same circumstances, and that a proper sentence to cover both offences would be one of twelve months' imprisonment. Accordingly, at first he sentenced appellant to six months' imprisonment, to begin at the expiration of the sentence of six months' imprisonment which he was then serving. Later, there being a doubt raised

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whether the words "subsequent offence" in s. 10 of the Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28)—which empowers the Court "wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime . . . . to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced"—meant "offence subsequently committed" (which the bigamy was not), or "offence subsequently tried" (which it was), Swift J. altered the sentence to one of eleven months' imprisonment, the first five months of which were to run concurrently with the sentence which appellant was already serving. By this sentence appellant would have to serve eight days more than he would have had to serve if Swift J. had not altered the sentence. Swift J., it is submitted, had no power to pass the later sentence, it being in part concurrent with an existing sentence, a matter with regard to which this Court has expressed doubt: *Woolley*, 3 Cr. App. R. 57: 1909. He also referred to *Rabjohns*, 1913, 3 K. B. 171; 82 L. J. K. B. 994; 109 L. T. 414; 77 J. P. 435; 23 Cox C. C. 553; 57 S. J. 665; 29 T. L. R. 614; 9 Cr. App. R. 33; and reference was made to Archbold's Criminal Pleading, 26th ed., p. 233; and to *Hemming*, 7 Cr. App. R. 236; 28 T. L. R. 402: 1912, *sen. red.*, on the meaning of the words "subsequent offence" in s. 10 of the Act of 1827.

F. R. Batt, for the Crown. It cannot be disputed that the sentence which appellant will have to serve under the existing order is eight days longer than was intended; the only question is what form the sentence should take.

The LORD CHIEF JUSTICE, after stating the facts as set out above, said: No doubt Swift J. altered the form of the appellant's sentence in view of the wording of s. 10 of the Criminal Law Act, 1827, because he doubted whether "subsequent offence" meant "offence subsequently committed" or "offence subsequently tried." In *Hemming* (above) that question was raised, but it was not decided. In the present case the question of the construction of the section does not arise. It is sufficient to say that Swift J. had power to pass a sentence concurrent with the sentence which the appellant was already serving, but, as it is

admitted that the sentence passed on the appellant was eight days longer than that which the judge had contemplated, this Court thinks that the appeal should be allowed to the extent of reducing the sentence by eight days.

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Sentence reduced.

G. B.

WILLIAM HURRELL.

15 *March.*

Sentence reduced in view of mental infirmity.

Appeal against sentence.

Appellant was convicted on February 3rd, 1926, before Talbot J., at Bodmin Assizes, of shooting with intent to murder, and was sentenced to fifteen years' penal servitude.

No counsel appeared, and appellant was not present,

The LORD CHIEF JUSTICE: This appellant was an illiterate man, of sixty-six years of age, and his record, before this offence, was quite unblemished. He says, in his notice of appeal, that his previous good character was not taken into account, and that sufficient consideration was not given to the constant worry he experienced owing to his wife's state of mind, to his old age, and to his laborious life. One cannot help thinking that this was a case where, if circumstances had permitted, and if witnesses had been called, a defence of insanity might have been successfully established. It is not necessary to say more.

In our opinion this sentence should be reduced to one of twelve months' imprisonment with hard labour, and the attention of the prison medical authorities should be specially directed to the man's state of mind.

Sentence reduced.

T. R. F. B.

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HENRY PORTER.

Sentence reduced in view of a long period of honest work.

Appeal against sentence, by leave of the Court.

Appellant was convicted on January 27th, 1926, before Swift J., at Liverpool Assizes, of receiving stolen jewellery, and was sentenced to three years' penal servitude.

Maxwell Fyfe for the appellant, who was present.

No counsel appeared for the Crown.

The Lord Chief Justice: In this case the learned judge at the trial obtained the impression for some reason that the appellant was an habitual receiver of stolen property. He said that gangs for housebreaking and stealing would not exist if it were not for men like the appellant, who were difficult to catch and difficult to convict, and that if this class of crime, which was so rampant in Liverpool, were to be stamped out, men like the appellant, who were the main cause of it, must be suppressed.

In fact, the appellant was convicted in 1909, seventeen years ago, and then suffered a term of imprisonment, but, so far as the evidence went, it appeared that since then the appellant had been living honestly and carrying on an honest business. Communication had been made to the police with regard to this appeal, and their reply was that the appellant, upon his discharge from the army, was employed as a bootmaker, and was so employed at the time of his arrest, and had a good working character. It was clear that somehow an error arose in the learned judge's mind about the character of the appellant. In the opinion of the Court, the sentence should be reduced to one of nine months' imprisonment with hard labour.

Sentence reduced.

Solicitors for Appellant—*G. J. Lynskey & Sons*, Liverpool.

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NORMAN FITZPATRICK.

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Evidence that defendant is an accessory after the fact does not support an indictment for being a principal, or accessory before the fact.

On the question of mens rea, *a defendant is entitled to give evidence of the state of his mind at the relevant time.*

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted on February 2nd, 1926, before the Recorder, at Nottingham City Sessions, of warehouse breaking and larceny, and was sentenced to twelve months' imprisonment with hard labour.

C. E. Loseby, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The only evidence against appellant went to show that he was, if anything, an accessory after the fact, and he was not charged as such. There was no evidence that he was either a principal or an accessory before the fact. Secondly, the learned Recorder wrongfully rejected evidence that appellant desired to give, and appellant was prevented from telling the jury what was his purpose and what was the intent in his mind when he set out with the other prisoners.

[He was stopped.]

A. M. Lyons, for the Crown. If the facts of the case are looked at as a whole, there was evidence that appellant was an accessory before the fact.

AVORY J.: The only charge in the indictment laid against this appellant was that of breaking and entering a warehouse, and stealing therein a quantity of cigars. The question for the jury was whether there was evidence of his being either a principal in the breaking and entering, or an accessory before the fact; there was no charge in the indictment of his being an accessory after the fact. The case against him rested chiefly on a statement he himself made to the police, with regard to his meeting with the two other men who were charged with him. It is to be observed that, looking at the evidence as a whole, it seems clear that before the meeting of the appellant with these other men the warehouse

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breaking had already taken place and the cigars had been removed from their usual position to a passage inside the door, and it is also clear upon this evidence, and upon the appellant's own statement, that it was quite consistent with the facts proved that the jury should be asked to draw the inference that, after the offence, the appellant was asked to come with his car and fetch away these cigar boxes. Assuming, then, that there was evidence from which the jury might infer that, in agreeing to do this, the appellant was conscious that he was going to remove stolen property, that would justify the conviction of the appellant as an accessory after the fact, but not as a principal or an accessory before the fact.

It is also clear that, if the prosecution were relying on the appellant being an accessory before the fact, it was all important to know whether, when he started out with his car, he knew that he was going to fetch stolen goods; because, only if such a conclusion were arrived at, could there be any ground for inferring that he was an accessory before the fact. It appears, however, that when counsel who appeared for the appellant at the trial was seeking to get from him what was his state of mind when he started out, the learned Recorder refused to allow that question to be put. The Recorder said that it did not matter what was in the appellant's mind, but it appears to this Court that what was in the appellant's mind was a most material issue for the jury to consider. As a very great authority said many years ago, the state of a man's mind is as much a question of fact as the state of his digestion. It is difficult to see why the Recorder took the view that he did. He said that the question was one for the jury, but before the jury answer such a question they must at least hear the appellant's own account of the state of his mind.

We think that the Recorder was in error in excluding the answer the appellant desired to give to the above question, and it is quite apparent that the case was left to the jury on the basis that they were justified in convicting the appellant as an accessory before the fact, if they thought that in going with his car to fetch the boxes he must have known that he was going to deal with stolen property. In all the circumstances, the case was not satisfactorily dealt with in the summing-up, and in particular the Recorder was in error in excluding the answer the prisoner desired to give about his state of mind.

For these reasons the appeal must be allowed, and the conviction quashed.

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Conviction quashed.

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PERCY INGRAM DENYER.

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"Reasonable and probable cause" in s. 29 (1) (i) of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, means "cause" for the demand, whether the accused believed that he had such reasonable and probable cause is not for the jury.

Appeal against conviction.

Appellant was convicted on February 13th, 1926, before Talbot J., at the Exeter Assizes, of uttering a letter demanding money with menaces, and was sentenced to six days' imprisonment, and ordered to pay the costs of the prosecution. He was not in custody.

J. A. Hawke, K.C. (*Sir Travers Humphreys* and *Harold Murphy* with him), for the appellant, who was present. Appellant is the "stop list" superintendent of the "Motor Trade Association." On January 14th, 1926, he wrote a letter on behalf of the Association to the proprietor of a garage at Honiton, stating that the Association had resolved that the garage proprietor should be offered an alternative to inclusion in the "stop list" of the Association, namely, that of payment of two cheques for 250*l.* and 7*l.*, and the insertion of an undertaking in "Motor Commerce" to observe the protected prices of motor cars, motor cycles, &c. It is submitted that s. 29, sub-s. 1 (i) of the Larceny Act, 1916, under which appellant was charged, is directed against cases where the intention is to extort money, not against cases where the object is the protection of a lawful trade interest. To constitute the offence there must be an intention to injure, or at least an additional element of *mens rea* beyond that found in the definition of the offence. The word "menaces" involves the existence of an improper motive: *Ware and de Freville, Ltd.* v. *The Motor Trade Association and Others*, 1921, 3 K. B. 40. The existence of a "reasonable and probable cause" does not require that there should be a legal claim to the money demanded.

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The learned judge here gave the jury no adequate direction as to the meaning of "absence of reasonable and probable cause."

Holman Gregory, K.C. (and *J. G. Trapnell*), for the Crown. Because the "Motor Trade Association" has the admitted legal right to put a man's name on their "stop list," it cannot be argued that therefore they have the right as an alternative to demand money from him with menaces. The analogy of a demand for money where a *bonâ fide* claim for damages exists is a false one.

T. R. F. B.

The LORD CHIEF JUSTICE (*a*): This appellant, Percy Ingram Denyer, was convicted, at Exeter Assizes, of feloniously uttering a letter demanding money with menaces. He was sentenced to six days' imprisonment, and was ordered to pay the costs of the prosecution. He now appeals against that conviction. The sentence, of course, was a merely nominal sentence, regard being had to the date upon which the Assizes had begun.

The first count of the indictment was under s. 29, subs. 1, paragraph (1), of the Larceny Act, 1916. It charged that the appellant, on the 15th of January, 1926, at Honiton, did utter, knowing the contents thereof, a letter or writing demanding certain property, namely, a cheque for £250, and another cheque for £7, from a Mr. Read, with menaces, and without any reasonable or probable cause. There were, in fact, two other counts in the indictment: under s. 31 of the Larceny Act, 1916, for threatening to publish, and proposing to abstain from publishing, the name of Mr. Read in a list called the Stop List. The learned judge held, however, that there was no case to go to the jury on those counts, and a verdict of acquittal was entered upon them.

In the result, the appellant was convicted on the first count, and he now appeals on the ground that on the facts which were proved, no offence under s. 29 of the Larceny Act was disclosed. He has urged, by his learned counsel, two propositions: first, that there was no evidence to go to the jury; and, secondly,

(*a*) This judgment is printed from the transcript of a shorthand note supplied by the courtesy of the Director of Public Prosecutions.

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that the summing-up of the learned judge was incorrect and inadequate.

To refer very shortly to the facts of the case, the appellant is a servant of what is called the Motor Trade Association; and in December of last year he was appointed to be the Stop List superintendent. That Association is a trade union within the meaning of the Trade Union Act, and its objects are, amongst other things, to protect the motor industry, and generally to watch over and protect the interests of manufacturers, wholesale retailers, and users of motor goods. Under its bye-laws, on proof to the satisfaction of the council of the Association that any person had offered, advertised, or sold any motor vehicle or motor goods at a price above or below the fixed price, the council could place the name of that person on the Stop List; and no member of the Association was allowed to supply any motor goods to, or to have any trade relations with, any person whose name was on the Stop List.

Mr. Read was the proprietor of Read's Garage at Honiton, and there he sold motor-cars and accessories. He was not a member of the Motor Trade Association. On the 12th of September of last year the appellant called at Mr. Read's garage and said that he was staying at Paignton and had just come from abroad, and was going to buy a house and wanted a car, and he asked Mr. Read to quote a price for a car. On the same day Mr. Read sold the appellant a tyre for the sum of £4. On the 15th of October, in consequence of a letter received from the appellant, Mr. Read met the appellant at the motor show at Olympia, and there offered to sell a car at a price which he named. In the following month, the month of November, Mr. Read received two letters from the secretary of the Motor Trade Association, and as a result he appeared before what is called the full council of the Motor Trade Association on the 12th of November. That was a hearing by way of appeal from a decision of what was called the Stop List committee. The appellant was present at that meeting of the council. Mr. Read cross-examined the witnesses, and gave his evidence both as to the offer of the car and as to the sale of the tyre. The matter was adjourned until the 14th of January, and then Mr. Read again appeared, and the appellant was again present. On the 15th of January Mr. Read received a letter, and that letter was the subject-matter

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of the indictment in this case. It was signed by the appellant: "For the Motor Trade Association, P. Ingram Denyer, Stop List Superintendent." And it was dated from the offices of the Motor Trade Association, 14th January, 1926, and was addressed to Messrs. Read's Garage, Honiton. The terms of this letter are of crucial importance in this case. The letter ran: "Dear Sirs, With reference to your appearance before the council of this Association this afternoon, I beg to inform you that it was resolved that you be offered an alternative to inclusion in the Stop List of payment of £250 to the Indemnity Fund of this Association and publication of the enclosed form of undertaking in 'Motor Commerce.' Please therefore let me have two cheques, one for £250 made payable to this Association, and one for £7 made payable to 'Motor Commerce,' together with the enclosed form of undertaking duly signed on or before Monday next, 18th inst., otherwise I shall have no option but to include your name in the Stop List, which must be in the printer's hands by that date." In other words, the letter is, upon its face, the clearest possible demand for two cheques for £250 and £7 respectively. The demand is made by letter dated the 14th January, and unless the payments are made on or before the 18th January, that is, three days after the receipt of the letter, there is "no option but to include your name in the Stop List, which must be in the printer's hands by that date." Mr. Read, like a sensible man, as soon as he got that letter, took it to the police. In the issue of "Motor Commerce" of the 23rd of January, there appeared a copy of the Stop List, with the name of Read's Garage, Honiton, appearing in it. The effect of the appearance of that name in that place, Mr. Read said, was "to paralyse the whole of one's business. I cannot buy a motor-car or even a can of petrol."

Those being, in the briefest outline, the facts of the case, it was urged here that there was no evidence to go to the jury, and that the learned judge incompletely, and, indeed, incorrectly, summed up the case to the jury. It is a little important to see what are the words of this section. S. 29 of the Larceny Act, 1916, deals with many different matters, and it provides that many different things, if they are committed, shall cause the person who commits them to be guilty of a felony. The first of those things is as follows: "Every person who utters,

knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause any property or valuable thing shall be guilty of felony."

It is abundantly clear, upon the materials already referred to, that this appellant uttered this letter; it is abundantly clear that he knew its contents; it is abundantly clear that it demanded £257. But it is said: "There is no evidence of menaces, and there is no evidence of the absence of any reasonable or probable cause." It is further suggested—faintly, perhaps, but still suggested—that on the true construction of this section it is not enough that these four named ingredients should be present: what is required also is that that which is done should be done feloniously.

To deal first with that second point, in the opinion of the Court this section describes what the felony is, and if the named ingredients are proved to be present,, it follows that a felony has been committed. If a person utters, knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause any property or valuable thing, it follows that that which has been done is a felony. It is no answer for a man to say: "I knew what is alleged, and I did what is alleged, but nevertheless I had no felonious intent."

Reference has been made to *R.* v. *Tolson,* 23 Q. B. D. 168: 1889: c. q. With regard to that case, it is a little important to bear in mind the observations made upon it in the case of *The King* v. *Thomas Wheat,* and *Marion Stocks,* in this Court, which is reported in 1921, 2 K. B. at p. 119; 15 Cr. App. R. 134. The judgment of the Court, at p. 126, contained this passage: "It is true that the judgment in *The Queen* v. *Tolson,* though influenced to a great extent by that proviso, proceeded mainly on the application of the maxim, *Actus non facit reum, nisi mens sit rea*—a maxim admitted to be uncertain and often misleading in its application, but it was limited in that case to the belief in the death of the former husband, and the case now in question of a belief in a divorce having been obtained was not discussed or considered. In our opinion the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the person accused to do the act forbidden by the statute,

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namely, 'being married, to marry another person during the life of the former wife or husband': see the judgment of Baron Bramwell in *R.* v. *Prince*, L. R. 2; C. C. R. 154: 1875, on this maxim, and *Bank of New South Wales* v. *Piper*, 1897, A. C. 383."

It is said, further, in the present case that here, at any rate, was no evidence of menaces. Now the word "menaces" is dealt with in another sub-section of this section. By sub-s. 4 it is provided as follows: "For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury or accusation to be caused or made by the offender or by any other person." In order that an accusation may come within that definition, it is not in the smallest degree necessary that the accusation should be untrue. An accusation, though true, perfectly fulfils the definition. What is said here, and said in the most unequivocal language, is, that unless these considerable sums of money are paid before a certain date, then not far distant, there will be an accusation printed in this widely circulated trade journal.

Finally it is said that there was no evidence of the absence of reasonable or probable cause, and for that purpose no little stress was apparently laid or sought to be laid upon a judgment in the case of *Ware and De Freville, Limited, and the Motor Trade Association*, reported in 1921, 3 K. B. at p. 40. There are at least two observations to be made with reference to that case. In the first place, it raised no such question as that which is involved in the present discussion. In that case, as was said in the clearest terms by Lord Justice Atkin at p. 76: "The plaintiffs do not allege that they have in fact suffered damage, and the relief they ask is confined to an injunction against publishing their name in a Stop List calculated either to injure them in their business, or to prevent any persons dealing with them, or to induce any persons to break their contracts with them." It is quite true that when one looks—and this is the second observation—at certain pages of this report, there are incidental references to the alternative proposal or demand for the payment of money. Such was the reference in the judgment of Lord Justice Scrutton at p. 64. But it is to be observed that those remarks were essentially of the nature of *obiter dicta*, and the analogy which the learned Lord Justice selects on p. 64 is an analogy in which, *ex hypothesi*, the person making the claim has a money claim sounding in damages. Lord Justice Atkin,

upon whose judgment apparently considerable stress was laid, does not expressly refer to the alternative money claim, but at p. 83 he does refer to some of the provisions of the statute with which this Court is at this moment concerned, the Larceny Act, 1916. But inadvertently, if I may say so with great respect, the learned Lord Justice says that "the menaces are defined" (in this statute) "as being threats to accuse of particular crimes, or to publish defamatory matter, and the like." One is bound to say that when one looks at the terms of the statute, by s. 29, sub-s. 1, the offence is complete if a person utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without reasonable or probable cause, any property or valuable thing. It is quite true that the remaining parts of the section go on to more precise matters, and to the allegation of a precise intent; but those observations do not apply to the opening words of this designedly comprehensive section.

Upon the question of what is meant by "reasonable and probable cause," it may be well to recall the words that were used in this Court, in *Emily Dymond's* case, reported in 1920, 2 K. B. p. 260; 15 Cr. App. R. 1, where, at p. 265, the judgment of the Court said: "In our judgment the question must be determined solely by reference to the language of the statute. The words are 'without any reasonable or probable cause,' and nothing in the original statute or in the consolidating statute suggests that an honest belief by the accused in a reasonable or probable cause for the demand would negative the crime. In order to constitute the offence it must be proved that the accused (1) uttered the writing, (2) demanded property or a valuable thing with menaces, (3) knew the contents of the writing, and (4) had no reasonable or probable cause for making the demand. It is for the jury to decide whether there was reasonable or probable cause for making the demand, and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it."

Now here, in the opinion of the Court, there was not merely some, but ample and overwhelming material for the consideration of this jury. It is said, and it has been said again and again, that because this Trade Protection Association had the legal right to put the name of Mr. Read upon the Stop List, it therefore had a legal right to demand money from him as

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the price of abstaining from putting his name upon the Stop List. In the opinion of the Court, that proposition is not merely untrue; it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers to an indefinite extent. There is not the remotest *nexus* or relationship between the right to put the name of Mr. Read upon the Stop List, and the right to demand from him £257 as the price of abstaining from that course.

Finally it is said that, even though the Court should hold—as we do hold without the slightest hesitation—that there was ample evidence here to go to the jury, nevertheless the learned judge did not adequately or correctly sum up the case to the jury. Upon investigation that criticism comes to this, that the learned judge, it is said, omitted adequately to direct the jury upon the question of the absence of reasonable and probable cause. It is not necessary to re-read the whole or many parts of this summing-up, but at p. 73 of the transcript one finds these words. "The next question is whether it is without reasonable or probable cause. Reasonable or probable cause does not mean reasonable or probable cause for putting him on the Stop List. You must assume on the one side the Association say that this gentleman so broke their regulations that they had to put him on the Stop List, and that they had a right to do so, and on the other side it is said 'No. You have to decide whether they have reasonable and probable cause for demanding money.' The question you have to decide is whether they had reasonable or probable cause for demanding the money. A person has no right to demand money, according to the Act of Parliament, as a price of abstaining from inflicting unpleasant consequences upon him. If you think that this money was demanded by threat, and that there was no reasonable or probable cause for demanding the money, then the offence is complete."

It is urged on behalf of the appellant that the learned judge ought to have dwelt more at large and more in detail upon the meaning of those words "reasonable or probable cause" in this particular context. If he had done so, it is apparent that any observations he would have made would have been with the tendency and the effect of limiting and circumscribing the generality of the excuse which he left to the jury. If he had been more precise, if he had condescended more to particulars,

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the effect must have been less and not more favourable to the accused. Looking at this summing-up as a whole, and reading one part of it with another, we are of opinion that it is not open to the criticisms which have been sought to be passed upon it.

In these circumstances and for these reasons we are satisfied that there was evidence to go to the jury, ample evidence; that this summing-up is free from the defects imputed to it, and that there is no reason whatever for interfering with the conclusion to which the jury came, and therefore this appeal is dismissed.

Appeal dismissed.

Solicitors for Appellant—*Engall and Crane.*

ALFRED PILLEY.

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Severity of sentence—Mistake in law.

Appeal against sentence.

Appellant pleaded guilty on February 24th, 1926, at the Salford Borough Sessions, to attempted housebreaking, and was sentenced by the Recorder to four years' penal servitude.

No counsel appeared, and appellant was not present.

The LORD CHIEF JUSTICE: It is quite clear that a slip was made in this case. It was thought that the sentence was passed not for an attempt, but for the full offence of breaking and entering a dwelling-house and committing larceny therein. The appellant is forty-five years of age, and though he had a good character when in the Army, he has been convicted altogether thirteen times, and the evidence of the police is that, when out of prison, he associates with well-known housebreakers and is himself a troublesome afternoon and evening housebreaker. The statute does not allow a sentence of four years' penal servitude to be passed for attempted housebreaking, and, in view of the fact that the sentence is one for an attempt only, we think that it should be reduced to a sentence of twelve months' imprisonment with hard labour.

Sentence reduced.

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Conviction quashed in view of fresh evidence and on the ground of non-direction and of receipt of inadmissible evidence.

Appeal against conviction and sentence, by leave of the Court, and application for leave to call further evidence.

Appellant was convicted on February 17th, 1926, at the Lancashire (Preston) Sessions, of indecent assault upon a female, and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

George Robertson, for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was convicted of indecently assaulting an old lady. At the trial, at which he was not defended by counsel, he set up the defence of an *alibi*, and the leave of the Court is asked to call here as a witness a Mrs. Timperley, who was unable to attend the trial owing to lack of money to pay her fare.

Leave being granted, the witness stated that on the night of December 10th, 1925, the date of the offence, appellant was at her house throughout the night, and that she had been asked by appellant to give evidence at the trial, but was unable to do so from lack of money for her fare.

It is submitted that the evidence of identification was unsatisfactory, and that, further, a detective officer gave hearsay evidence that appellant had been in the vicinity of the almshouses where the prosecutrix lived on the night of the offence.

Ormerod, for the Crown. It is true that photographs of appellant and other men were shown to persons, who subsequently identified appellant, but there was nothing irregular in this, as appellant had not been arrested. It is admitted that the statement of the detective officer was inadmissible in evidence, but apart from this there was sufficient material upon which the jury could convict.

Mr. Justice Avory: This appellant was charged with an indecent assault upon an old lady of above eighty years of age, and

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his answer to the charge was that upon the evening in question he was not at the place where the offence was committed at all. He gave evidence in the witness-box where he was, namely, at Lancaster, and he stated that on the day in question and on the night before he had been at the house of a Mrs. Timperley, and that he was in that house from seven o'clock onwards on the evening in question. He further stated that he had requested Mrs. Timperley to attend the trial to support his evidence. She did not appear there, but, by leave of this Court, she has been called here and has given evidence corroborating the story of the appellant. She has also given the same explanation about her not being present at the trial as the appellant himself furnished in his notice of appeal—namely, that she was required to attend, but was unable to do so because she had not sufficient money.

It is necessary, however, to consider this case quite apart from the evidence of Mrs. Timperley. First of all, it is obvious that if the case had rested on the identification of the prosecutrix alone, who admitted in cross-examination that she was a little deaf and that she could see with only one eye, and not much with that, it would not be safe for any jury to convict. But a detective sergeant also was called as a witness, and he was asked this question: "Did you receive information about this offence on December 10th?" His answer was "Yes." He was then asked: "What steps did you take?" and he replied, "I made enquiries on the following day and ascertained that the prisoner had been in the vicinity." It is quite clear that the jury would understand that answer to mean that the sergeant had ascertained that the prisoner was in the vicinity of the scene of the crime on the date in question. The statement obviously was not admissible in evidence, and it was not the fault of counsel who appeared for the prosecution that the evidence was given. The effect of it might have been corrected if the Chairman, in his summing-up or at the time when the evidence was given, had told the jury to disregard it. No such warning, however, was given, and the Court must assume that the evidence had sunk into the minds of the jury before the prisoner had any opportunity of offering evidence, and the jury, not finding any corroboration of the *alibi* set up by the prisoner, may have said to themselves that they would not believe the evidence that he gave on oath.

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In the result, this Court has come to the conclusion that the identification of this appellant, in all the circumstances of the case, was not satisfactory, and that it was unsafe and improper for the jury to convict in the absence of the evidence which was improperly admitted, and that the conviction ought not to stand and should be quashed.

Conviction quashed.

T. R. F. B.

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CHARLES FORBES McLEAN.

Before putting a question to a defendant under s. 1 (*f*) *of* 61 & 62 *Vict. c.* 36, *the Criminal Evidence Act,* 1898, *counsel should ask the judge whether defendant has brought himself within par. ii. thereof.*

Appeal against conviction and sentence.

Appellant was convicted on March 3rd, 1926, at York Assizes, of obtaining money by false pretences, and also of fraudulent conversion, and was sentenced by Branson J. to twelve months' imprisonment with hard labour.

G. H. B. Streatfeild for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. It is submitted that at the trial appellant was wrongly cross-examined on a previous conviction, on the ground that "the nature and conduct of the defence was such as to involve imputations on the character" of the prosecutrix within the meaning of sect. 1 (f) of the Criminal Evidence Act, 1898. He said, in fact, that the prosecutrix's story was a fabrication from beginning to end, and that it was told to further her own interests, in order to explain to her relatives how she came to have spent their money or her money. That was no more than an emphatic denial of the charge. To come within the above section there must be an attack on the general character of the witness as contrasted with her conduct in the case. The language of the section indicates that "character" means "general character," and a useful comparison may be made between the cases of *Rouse,* 1904, 1 K. B. 184; 13 L. J. K. B. 60; 20 Cox, C. C. 592; 89 L. T. 677; 52 W. R. 236; 20 T. L. R. 68; 68 J. P. 14: C. C. R.: c. q.; and *Grout,* 74 J. P. 30; 26

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T. L. R. 60; 3 Cr. App. R. 64: 1909: c. q.; and, on the other hand, *Rappolt*, 6 Cr. App. R. 156: 1911. In the latter case, cross-examination on prisoner's character was not allowed until he made an accusation against a Crown witness in regard to conduct wholly unconnected with the circumstances of the charge. The same line of demarcation is to be found by an examination of the cases of *Bridgwater*, 1905, 1 K. B. 131; 21 T. L. R. 69; 74 L. J. K. B. 35; 20 Cox, C. C. 737; 91 L. T. 938; 69 J. P. 26: C. C. R.: c. q.; *Preston*, 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 25 T. L. R. 280; 2 Cr. App. R. 24: 1909: c. q.; and *Hudson*, 1912, 2 K. B. 464; 81 L. J. K. B. 861; 23 Cox, C. C. 61; 7 Cr. App. R. 256. In the latter case it was hinted that the fact that the prisoner was not defended by counsel should be considered before admitting the cross-examination. I rely on *Rich. Jones*, 3 Cr. App. R. 67: 1909.

Paley Scott, for the Crown. Judicial opinion on the interpretation of this section has not been entirely consistent, and there is no clear guiding principle. Whether an imputation on the character of the Crown witness is involved by the prisoner's attack is in reality a question of degree. One of the earliest authorities after the passing of the Act is *Kate Marshall*, 63 J. P. 36: 1899, which laid down that a suggestion that a Crown witness himself committed the crime is an imputation within the meaning of the section, and that decision was approved in *Preston* and *Hudson*. The authorities have been reviewed in the recent case of *Dunkley*, 19 Cr. App. R. 78: 1926. It is, however, clear that there was an attack on the general character of the prosecutrix, and that it was not confined to her evidence in this case.

T. R. F. B.

The LORD CHIEF JUSTICE (*a*): This appellant, Charles Forbes McLean, was convicted at York Assizes upon an indictment which charged him, first of all, with obtaining on the 26th August, 1921, 115*l.* from Mrs. May by false pretences; secondly, with obtaining 45*l.* from her by false pretences; and thirdly, with converting that sum of 45*l.* to his own use. He was sentenced to twelve

(*a*) This judgment is printed from a transcript of a shorthand note supplied by the courtesy of the Director of Public Prosecutions.

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months' hard labour, and now appeals against both conviction and sentence.

The facts of the case, very shortly, were that in August, 1921, Mrs. May, a widow, living in Hull, saw an advertisement in a Hull newspaper which was in these terms: "Ship's medical officer, 32, wishes to meet refined educated lady with view to business or matrimonial partnership. For appointment write." and then a particular number was given. Mrs. May sent a reply, and as a result she met the appellant. He then told her he was a surgeon on a whaling ship; he told her where the ship was lying. He said that he had a position in Madeira as a surgeon through someone belonging to the Royal Mail Steam Packet Company, and by way of supporting that statement he produced two letters which had a printed heading "Royal Mail Steam Packet Company." He went on to say that he would want 450*l.*, and asked her if she could help him. She said that she could and that she had about 100*l.* in the bank, and also some furniture. The appellant afterwards rang her up on the telephone and said that it would be illegal for the wife to have anything to do with the transaction, and therefore he had borrowed the sum of 115*l.* from Dr. Greaves, and he asked her to go and draw her money out of the bank, and that same evening she gave the 115*l.* to the appel-

and it was arranged that they should marry. Mrs. May sold her furniture and bought a wedding cake. They arranged to go to London on the 14th September, and the appellant said that he had put the money in the bank so he could draw it out in London; he said she had better do the same thing with hers. She then gave him another sum of 45*l.*, the balance of 50*l.* for which she had sold her furniture, and she arranged to meet him at the five o'clock train. The appellant, of course, did not appear.

Now there was ample evidence to show that these representations which he had made were untrue, and the case was as plain as a case could be, but the appellant, who was not defended by counsel, went into the witness-box and was asked in the most general terms to say what he wanted to say about the charge, and then, by a curious trick of the mind perhaps, he imputed to Mrs. May the very sort of manœuvre which he himself had practised upon her. He said: "The story this woman has told is entirely her own fabrication from beginning to end, and it was to further her own interests pure and simple that she told this story, to obtain money

from her father, her aunt, and her sister. She knew very well that I lived not 500 yards away from this woman, and she knew very well that I was an engineer, and she knew as well that I had a wife." In other words, the prisoner says in effect that, "having conceived the design, or having carried out the design of obtaining money from members of her family by false pretences, she seeks to shield herself by making this criminal charge against me." In cross-examination the matter was put into a single sentence, in this way: "Are you telling the jury that Mrs. May has come here, having spent her own money, to charge you with swindling her out of it, in order to explain to her parents how she comes to have spent her money or their money? Is that your suggestion?" "Certainly it is."

Now in those circumstances, and after some further questions which really do not add anything, the appellant was asked whether he had not been charged with obtaining a sum of 120*l.* from another woman, all the money she had, and whether he had not in fact been convicted of that offence. The witness objected to the question, but the learned judge said: "You have attacked the character of the prosecutrix, and, therefore, the counsel for the prosecution is within his right in cross-examining you on that." The real question in this case is whether, in the circumstances, that cross-examination, involving the reference to a previous conviction, was permissible or not.

It may be said that there were one or two unfortunate coincidences or incidents in this case. In the first place, the appellant not being defended by counsel, was invited in the most general terms to say what he wished to say. "Now tell the jury what you want to say about this charge against you," and he forthwith launched out upon his attack on Mrs. May. In the second place, it might so easily have been pointed out, when he did make this attack, that he had put no question to Mrs. May in cross-examination to that effect, and a request might have been made to recall Mrs. May in order that she might have an opportunity of answering this injurious suggestion, but that course was not followed. Then came the third incident that, as counsel so frankly said, he omitted to ask the leave of the judge before he embarked upon this particular line of cross-examination. In fact, what he did was to ask the question, and then afterwards the learned judge was called upon to express his view by a word of

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protest from the prisoner himself. In the opinion of the Court, this kind of question is best prefaced, whenever it is put, by an express application to the judge in order that the judge may have an opportunity of preventing it if he thinks it desirable to prevent it (*a*).

Now upon the general question, this Court considered the matter a few weeks ago at some length in the case of *Dunkley*, and it is not necessary to enter at large upon an examination of this particular passage in the first section of the Criminal Evidence Act, 1898; the important words are: "unless . . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." Attention has been directed, by no means for the first time, to a considerable number of cases interpreting those words. It is enough, perhaps, to refer once more to a very valuable passage in the judgment of the Court, a judgment delivered by Mr. Justice Channell, in the case of *The King* v. *Preston*, in 1909, 1 K. B. p. 568, at p. 575. Speaking of the words now under consideration the learned judge said: "The latter part of the section is that which it is material to consider in the present case. It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner on his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence." It is perhaps a little important to observe that three years later, in the case of *The King* v. *Hudson*, reported in 1912, 2 K. B. p. 464, at p. 470, a Court consisting of five judges said with emphasis in a written judgment that "They certainly had no intention, in giving judgment in *R.* v. *Preston*, of overruling *R.* v. *Marshall*, which was cited before them in the course of the argument."

To apply that canon to the particular facts of this case, it is necessary to ask what is the fair meaning of this passage on p. 14

(*a*) See *David Watson*, 29 T. L. R. 450; 8 Cr. App. R. at 254; C. C. A.: 1913: *per* Pickford J.

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of the transcript, supplemented as it is, by the further words in cross-examination at p. 16. "The story this woman has told is entirely her own fabrication from beginning to end, and it was to further her own interests pure and simple that she told this story to obtain money from her father, her aunt, and her sister." In our opinion, and it is not necessary to say more upon the point, it is not possible to say that that evidence was not such as to involve imputations on the character of Mrs. May, those words being construed in the way which the cases already referred to show is the correct way.

In the opinion of the Court, therefore, this appeal against the conviction fails.

Appeal dismissed.

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30 *March.*

DANIEL MISELL.
JUDAH RINGLE.
JOHN ERRINGTON.

"Obtained" in s. 33 of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, means obtained physically.

Appeals against conviction.

Appellants were tried together before Wright J. at Manchester Assizes, and were convicted on February 25th, 1926. Misell and Ringle were convicted of receiving property obtained in circumstances amounting to misdemeanour, and were each sentenced to nine months' imprisonment. Errington was convicted of fraudulent conversion, and sentenced to eighteen months' imprisonment.

Cyril Atkinson, K.C. (and *St. John Hutchinson*), for Misell and Ringle, who were present. The evidence for the prosecution was that Errington was traveller and manager for the committee of inspection appointed by the creditors of Peter Stewart, who carried on business as a manufacturer of raincoats, and that in that capacity he bought goods at market price and sold them to the other two appellants, who were job, stock and salvage buyers, carrying on business in partnership, at prices very much below

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DANIEL MISELL.
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JOHN ERRINGTON.

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what was alleged to be a fair price. There were two counts in the indictment, charging all three appellants with a conspiracy fraudulently to convert the goods in question, and also with a general conspiracy to defraud Peter Stewart and the committee. On each of these counts all three appellants were acquitted. These two appellants were convicted of receiving only under s. 33, sub-s. 1 of the Larceny Act, 1916. It is clear from the evidence that Errington acted in the capacity of a servant, and that it was part of his duty to sell the goods in question. Even if he had a fraudulent intention in selling at so low a price it cannot be said that the goods in question had been obtained in circumstances amounting to misdemeanour and that these two appellants knew of such obtaining and received the goods so knowing, when in fact Errington was a servant and obtained the goods for the purpose of sale, as was his duty. It is not clear whether he was alleged to have converted to his own use or that of his co-defendants.

P. Redmond Barry for Errington (under s. 10 of the Criminal Appeal Act, 1907), who was present, was not called on to argue.

Greaves-Lord, K.C. (and *P. Masketh*), for the Crown. The word "obtaining" in s. 33, sub-s. 1 of the Larceny Act, 1916, should be given a wide interpretation. Errington here entered into contracts to purchase these goods, and subsequently purported to enter into sales with the other two appellants. Even though his original possession of the goods was lawful, his subsequent change of intention in regard to the disposition of them constitutes a sufficient "obtaining."

The LORD CHIEF JUSTICE: It is quite clear, when one looks at the evidence in this case, that Errington was in the position of a servant, and it is tolerably obvious that there was a time when proceedings on that footing were contemplated, but there appeared to be a difficulty in saying whose servant he was at the material time. It is also clear that the prosecution considered that the gravamen of the matter was conspiracy, and that the learned judge was pointing out to the prosecution shortly before the summing-up the difficulty that there was in regard to evidence of conspiracy, and the great difficulty that there was in the allegation of fraudulent conversion. It is also apparent that the learned

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judge got very little assistance from the defence, and that, whereas it should have been pointed out to him that Errington was in the position of a servant and that there was no case of fraudulent conversion, what was suggested on behalf of the defence was that there was no evidence of conspiracy, but that there might be evidence of receiving. In other words, the unfortunate conclusion seems to be that the case was misconceived by the prosecution and the defence also was misconceived by those responsible for it. The jury, after a prolonged deliberation, took the sting out of the case by finding that there was no conspiracy, but this Court has to deal with what the jury has found.

I will deal first with the case of Errington. It is clear that Errington was in the position of a servant and that s. 20 of the Larceny Act, 1916, did not apply to him, and, more than that, the case as put to the jury might be thought to put a charge which was not even made, for words were borrowed from paragraph (i) and grafted on to paragraph (iv) (b) of s. 20, sub-s. 1 of the Larceny Act, 1916. It is quite conceivable that the jury by their verdict really intended to find Errington guilty of having fraudulently converted to his own use property with which he had been entrusted, but that was not even alleged against him.

With regard to the other two appellants, the jury have found that they were guilty of having received property, which in the material part of the indictment is spoken of as property obtained to their knowledge in circumstances which amount to misdemeanour. The proposition that they could be guilty of that offence seems to this Court to involve a confusion of thought. The servant had received the goods in his capacity of traveller and manager, but it is suggested that, if and because he afterwards sold them at a low price with a fraudulent mind, he then and thereby obtained the goods received in circumstances amounting to misdemeanour. In other words, the word "obtained" in s. 33, sub-s. 1 of the Larceny Act, 1916, is sought to be construed as if it were wide enough to apply to a particular change of intention on the part of a person into whose hands goods have lawfully come. But by "obtained" an actual and physical obtaining is meant, and what is referred to is such obtaining as occurs in the case of an obtaining by false pretences, and a larger and comprehensive form of words is used, so as to include property obtained by any other kind of fraud.

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It follows that in every respect this prosecution fails, and it appears to this Court that there is not any ground on which the conviction of any one of these appellants can be maintained. The appeal of each of the three appellants, therefore, is allowed.

Convictions quashed.

Solicitor for the Appellants Misell and Ringle—*Jonathan E. Harris.*

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SHEARMAN.

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19 *April.*

THOMAS GETHING.

Severity of sentence.

Appeal against sentence, by leave of the Court.

Appellant was convicted on February 19th, 1926, at Cardiff Assizes, of receiving stolen goods, and was sentenced by Fraser J. to three years' penal servitude.

Appellant, in person, added nothing to his written statement.

The Crown was not represented by counsel.

THE LORD CHIEF JUSTICE: It is clear in this case that a warehouse was broken into and that boots were stolen by some persons, and that certain pairs were dealt with by the appellant. It is said that the appellant was led into the crime by some other person.

There are two matters that weigh with this Court. The first is the youth of the appellant, and the second is the fact that, although the appellant has been previously convicted, he has on each occasion after his release found and done honest work. After being twice bound over he was, in 1922, sentenced to six months'

imprisonment, and in 1924 to fifteen months' imprisonment. Regard being had to all the circumstances of the case, and especially to the youth of the prisoner, it is the opinion of the Court that this sentence may be reduced to one of sixteen months' imprisonment with hard labour. But this is the last time any such considerations will lead to a reduction of any sentence passed on this appellant.

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THOMAS GETHING.

Hewart L.C.J.

Sentence reduced.

T. R. F. B.

GEORGE BERRY.

26 *April.*

Misreception of evidence and improper interference by the Bench do not constitute "nullity." Nor is the trial "null," when, after evidence taken, defendant is by mistake induced to plead guilty.

Conviction quashed in view of illegal evidence.

Appeal against conviction and sentence.

Appellant was convicted on April 6th, 1926, before the Chairman, at East Sussex Quarter Sessions, of housebreaking and larceny, and was sentenced to twelve months' imprisonment with hard labour.

C. G. L. Du Cann for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant put a question in cross-examination to a police officer about certain documents found upon him on arrest, and the contents of these documents, showing that appellant had been previously convicted, were wrongfully disclosed to the jury at the trial. Secondly, appellant was wrongfully induced by the Chairman to withdraw his original plea of "not guilty."

[He was stopped].

R. T. Sharpe for the Crown. It is admitted that the contents of the documents in question were improperly disclosed. It is submitted, however, that as the accused never in these circumstances admitted felonious intent, the effect of the Court inducing him to withdraw his plea was to render the trial a nullity.

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GEORGE BERRY.

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The LORD CHIEF JUSTICE: This appellant was indicted at the East Sussex Quarter Sessions for housebreaking and larceny. He pleaded not guilty, and afterwards, when certain evidence had been given, and in circumstances to which reference must presently be made, withdrew his plea and pleaded guilty, and was sentenced to twelve months' imprisonment with hard labour. He now, by leave, appeals against conviction and sentence.

In the course of the trial, at which the accused was not represented, a question was put by him in cross-examination, which clearly intended to suggest that there had been a mistake in identification. Later, when a police constable had given evidence about the arrest of the accused, the accused put to him in cross-examination the following questions:—Q. "At Rye, did I hand you an official envelope with documents from Scotland Yard?"—A. "Yes." Q. "May I ask how many years' service you have had in the police?"—A. "Six years." Q. "Would you say that a man with such documents on him would premeditate——." The Chairman then interposed: "I don't think you can possibly ask that. I want to know what the documents were," and the witness answered, "Official documents." If the matter had rested there no difficulty on this part of the case could have arisen. But it was not allowed to rest there. There was another question by the Chairman: "What were they?" and the witness answered, "Prison discharge papers." The matter did not rest even there, for the Chairman proceeded to ask the police constable: "Did he say anything when he handed them to you?"—A. "No." Q. "How many times did they show he had been discharged?"—A. "He was out on ticket-of-leave." The accused then said: "This is contrary to the laws of British justice that that document should be discussed in Court in the circumstances; the contents of the document, I mean. The jury know now that I have come out of prison now you have raised the question." The Chairman replied: "It is entirely your own fault. You asked the question whether you had official documents in your possession." The accused protested: "It was an indirect question, not a direct one." The case continued, and the accused gave evidence on his own behalf. He was asked in cross-examination what he said to the constable. The Chairman again intervened: "I don't see how your admission is consistent with a plea of not guilty. You are charged with breaking and entering a dwelling-house

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and stealing a box of cigarettes, and after your evidence-in-chief you agree with every word the constable has said. How can you put in a plea of not guilty?" As counsel for the Crown has frankly said, the appellant had not admitted all the ingredients of the offence with which he was charged. The Chairman then said: "In your own interest I suggest to you that you should withdraw your plea, because it is impossible to substantiate it." Then, and not till then, the appellant withdrew his plea and pleaded guilty.

There are in this case three features that call for observation. First, the character of the accused was treated as being in issue, and the injurious contents of documents were clearly disclosed to the jury. Secondly, he was told that he could not possibly substantiate his plea of not guilty. Thirdly, on a substituted plea of guilty, he was sentenced to twelve months' hard labour. It is urged on behalf of the Crown that the true conclusion is that the trial was a nullity and that the appellant should be tried again. This Court cannot take that view. We do not think that the trial was a nullity, but, on the other hand, regard being had to the matters to which I have referred, we cannot conclude that the conviction was satisfactory, and whatever may be the intrinsic merits of the charge and the defence, we feel compelled, however reluctantly, to allow the appeal and to quash the conviction.

Conviction quashed.

T. R. F. B.

CHARLES WHITBY.

Sentence reduced in view of a period of honest work.

Appeal against sentence.

Appellant was convicted on April 7th, 1926, before the Chairman, at Anglesey Quarter Sessions, of housebreaking and larceny, and was sentenced to three years' penal servitude.

No counsel appeared.

The appellant in person.

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The LORD CHIEF JUSTICE: The appellant has undoubtedly been sentenced on various previous occasions. As a boy, he was birched for small thefts, and in 1909 he was sentenced to nine months' imprisonment for burglary. His last previous conviction, however, was in 1910, when he was sentenced to three months' imprisonment for stealing a fowl. He urged in the Court below, as he has urged here, that he had been trying to go straight since his conviction in 1910, and undoubtedly there has been a clean interval of sixteen years. It appears to this Court that that effort and that interval ought to have been recognised when sentence was being passed, and in all the circumstances of the case we think that a sentence of six months' imprisonment with hard labour should be substituted.

Sentence reduced.

T. R. F. B.

HENRY WILLIAM MOLDON.

Leniency of sentence.

Appeal against sentence, by leave of the Court.

Appellant was convicted on March 22nd, 1926, before the Deputy-Chairman, at the London Sessions, of receiving stolen goods, and was sentenced to twelve months' imprisonment with hard labour.

Charles Doughty, K.C. (with him, *E. Abinger*) for the appellant, who was present. The sentence here was excessive as, although there were a number of trifling convictions against appellant, there was nothing involving fraud or dishonesty. It was not proved that he was a habitual or a professional receiver.

G. G. Raphael (with him, *Percival Clarke*) for the Crown. There was evidence that appellant was a professional receiver.

The LORD CHIEF JUSTICE: The appellant was charged with receiving two bicycles, well knowing them to have been stolen, and was sentenced to twelve months' imprisonment with hard labour. He applied for leave to appeal against both conviction and

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sentence, and this Court came to the conclusion that there was no ground for granting leave to appeal against conviction, but we said, with the usual warning, that the sentence called for further consideration.

The appellant carried on the business of selling bicycles in Chiswick High Road; and his books showed that between September, 1924, and February, 1926, he had bought 116 bicycles from a hundred different persons at an average price of 12*s.* 4*d.* It is not right to pay undue attention to general remarks made, after the jury had returned their verdict, about suspicions entertained of appellant's dealings, nor to the fact that on three different occasions the appellant was charged with receiving stolen goods and was acquitted. It is desirable, however, to look a little closely at the special facts of the particular charges on which the appellant was convicted. It is quite plain that these two bicycles were taken to the shop of the appellant immediately after being stolen. The bicycles were bought for a very few shillings each. But the evidence disclosed a rather ingenious system on the part of the appellant. The appellant stated that his method was as follows: If a seller could not bring with him a receipt, he generally gave that seller only a small sum on account till a receipt could be produced. In this case small sums only were paid to the thieves, and an account book belonging to the appellant was produced with entries containing the words "on account" against certain sums, or else circles drawn round the figures. The jury did not like these entries, and were highly dissatisfied with this method adopted by the appellant.

It seems clear that this appellant, by means of a system which showed no little ingenuity and boldness, was systematically receiving stolen property. It is quite true that attention ought not to be paid to the fact that he was charged on three occasions with receiving stolen goods, and was acquitted, but that experience should have led an honest man to be more than usually careful. The payments that he made for stolen bicycles were small, and the suggestion was afterwards made by him that they were payments on account only, and that suggestion was sought to be reinforced by written entries which appeared to the Court below, as they appear to this Court, to be merely afterthoughts. In one case, after receiving a bicycle, the appellant disposed of it with clear notice of the theft.

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On these materials, and looking at the facts disclosed, we are of opinion that this sentence does require consideration, and, as we pointed out before, this Court does sometimes reconsider a sentence in the direction of increase. We are not satisfied that this sentence was adequate, and accordingly we increase it to one of eighteen months' imprisonment with hard labour.

Sentence increased.

Solicitors—*Henry T. Nicholson; Wontner & Sons.*

T. R. F. B.

3 *May.*

JOHN HOMER.

Conviction quashed on the ground of misreception of evidence.

Appeal against conviction and sentence.

Appellant was convicted on April 6th, 1926, before the Chairman, at Staffordshire Sessions, of housebreaking, and was sentenced to three years' penal servitude.

H. H. Maddocks for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was charged with his two brothers, Charles and Benjamin, who pleaded guilty. Appellant pleaded not guilty, and during his trial his brothers were called as witnesses for the prosecution, and statements which they had made implicating appellant were read. These witnesses were not asked whether the statements were true, and, it is submitted, evidence of those statements was wrongly admitted.

E. A. Godson for the Crown. There was sufficient evidence against appellant other than that of the statements.

The LORD CHIEF JUSTICE reviewed the facts as set out above and said that, in view of them, the conviction could not stand.

Conviction quashed.

G. B.

JAMES DOUGLAS.

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In an indictment for larceny the specific things alleged to be stolen must be set out.

Appellant was sentenced on March 30th, 1926.

Truell for appellant (under s. 10 of the Criminal Appeal Act), who was present.

E. Fulton for the Crown.

The facts sufficiently appear from the judgment.

The Lord Chief Justice (*a*): This appellant, James Douglas, pleaded guilty at the London Sessions, before the Deputy Chairman, to two counts of an indictment which charged him with stealing a Gladstone bag, the property of one person, and a suit of clothes, the property of another person. He was found by the jury also to be a habitual criminal. He was sentenced to three years' penal servitude for the two substantive offences, and he was also ordered to be kept in preventive detention for five years. He now appeals against the sentence of three years' penal servitude, and applies for leave to appeal against the finding that he is a habitual criminal. It may be observed that in both of the counts of the indictment for larceny there is an allegation that the appellant stole a specified article *and other articles*. That form of indictment is objectionable, as has been pointed out by this Court again and again. It is objectionable because, among other things, it places a difficulty in the way of a defendant who desires afterwards to plead, it may be, *autrefois acquit* or *autrefois convict*.

Now with regard to the facts of the cases included in the indictment, they were shortly these. On the 22nd February the appellant took a room at a hotel in Essex Street. He had no luggage with him, but he made a statement to the effect that his daughter had sent his luggage by taxi-cab, and that the driver

(*a*) This judgment is printed from a transcript of a shorthand note supplied by the courtesy of the Director of Public Prosecutions.

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had stolen it. The appellant left that hotel on the 4th March, that is, about ten days later, and after he had left it was found that the rooms of two fellow lodgers had been, as the phrase was, "turned inside out," and a bag and clothing belonging to one of them to the value of about 13*l*., and clothing belonging to the other to the value of about 10*l*., were missing. The appellant then took a room at a boarding-house in Holland Park, and on the 8th March he was arrested at that house on the charge of attempting to obtain jewellery from one Chaumet. That charge was the subject-matter of the first count of the indictment against the appellant, but the appellant having pleaded guilty to counts two and four, that charge in the first count was not, in fact, proceeded with. On the 8th March, when he was arrested, the bag belonging to Mr. Trimen, one of his fellow lodgers at the previous hotel, and the other property belonging to Mr. Trimen and Mr. Ellis, the second of those fellow lodgers, were actually found in his room, and the appellant at that time was wearing some of Mr. Ellis's clothes.

Those were the charges to which he pleaded guilty, and for those offences he was sentenced, and most properly sentenced, to three years' penal servitude.

With regard to the charge of being a habitual criminal, evidence was given that the appellant was between sixty and sixty-five years of age, and three convictions were duly proved against him in accordance with the statutory notice which was also proved, and after those convictions had been proved evidence was further given of four other convictions against the appellant. On five of those seven occasions the appellant had been sentenced to penal servitude, and it appears that five of those previous convictions referred to stealing jewellery. Evidence was further given that the appellant was released on licence from his last term so recently as the 22nd day of February last, that is to say, some ten days before the commission of the offences to which he pleaded guilty. There followed in the notice to the appellant two further grounds, and as I understand, it is with reference to those grounds that objection is made on behalf of the appellant to-day. The notice contained these passages: "That in addition to the charge of larceny upon which you have been committed for trial you have also been committed for trial for attempting to obtain by false pretences on the 8th March, 1926, in the name of Lieut.-Col.

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Hewart L.C.J.

James Robertson, a diamond ring of the value of 100*l.* from one Joseph Chaumet, a jeweller in New Bond Street, and further, that on the 5th March, 1926, you also attempted to obtain a quantity of jewellery by false pretences in the name of Lieut.-Col. James Robertson from three other firms of jewellers, namely, Messrs. Holmes & Co., Messrs. Attenborough & Co., and Messrs. Boucheron," all in New Bond Street, or in Old Bond Street.

Evidence was given from Messrs. Holmes & Co. that in March the appellant had called, and had given the name of Lieut.-Col. Robertson, of 36, Holland Park, and he said that he wanted to make a present to his daughter, and wanted to spend a couple of thousand pounds, and he asked for rings to the value of about that sum to be sent to Holland Park. A partner in the firm afterwards called at Holland Park, but did not leave any rings, either then or later. A witness from Messrs. Attenborough & Co. was called, and he gave evidence that on 6th March, in reply to a letter, an assistant was sent to see a Colonel Robertson at 36, Holland Park, and that he there saw the appellant in that name, and the appellant asked the assistant to bring some rings, but no jewellery was taken or handed to the appellant.

Now it is to be observed that upon this charge of being a habitual criminal no evidence was offered with reference to the jewellery which it was said the appellant had attempted to obtain from Chaumet, that is to say, no evidence was offered with reference to the case that had formed the basis of that count in the indictment to which the appellant had not pleaded guilty, and which had not been proceeded with. That is the distinction—one of the distinctions—between the present case and the case to which our attention has been directed of *R.* v. *Harold Jones* in 16 Cr. App. R. at page 124: 1922: c. q. as hab. crim. The appellant gave evidence on his own behalf. He urged that as soon as he was discharged from prison he looked for work, that he saw a man who had been in prison with him, that that man had a business which he called "The Artistic Showcard Company," and that he was willing to employ the appellant if the appellant could find 20*l.* to help him to get a larger business. The appellant said that he applied to the Central Association of Discharged Convicts to advance him the sum of 20*l.*, and, in fact, he did apply, and the Central Association naturally enough was not willing to advance him the sum of 20*l.* Then the appellant

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went to the Church Army, and he said they gave him two weeks' board and lodging, and then said they could do no more for him. In his efforts also he said he bought a few newspapers and sold them. He wrote to the Home Secretary and delivered the letter personally at his house, but he got no answer. He also wrote to other people trying to get work, and he gave evidence, too, about what he said he had done in previous intervals between one term of imprisonment and another. It does appear that for some months in 1918, and in the early part of 1919, he obtained employment at a bank. With regard to the two jewellers who had been called he said that he did not intend to defraud.

In those circumstances, and with those materials before them, the jury came to the conclusion that this man then was a habitual criminal, and it is difficult to imagine how they could possibly have come to any other conclusion.

There is no reason at all to interfere either with the sentence of penal servitude, or with the finding that the appellant is a habitual criminal, or with the sentence of preventive detention passed upon him, and in all respects, therefore, this appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER, AND MR. JUSTICE FINLAY.

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20 *May.*

JAMES WILLIAM D'ARCY.

In imposing sentence on persons often previously convicted, regard must be had to the gravity of the offence in question.

Appeal against sentence.

Appellant was convicted on April 7th, 1926, before the Chairman at East Kent Sessions, of burglary and storebreaking, and was sentenced to two concurrent sentences of four years' penal servitude.

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JAMES WILLIAM D'ARCY.

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Salter J.
Finlay J.

Appellant in person.

The Crown was not represented.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to an indictment charging him with storebreaking and larceny on January 30 and to another indictment charging him with burglary and larceny on January 24, when he broke into a club at Kennington and stole whisky, brandy, tobacco and cigarettes to the value of £5. He also admitted a further larceny and it was taken into consideration when sentence was passed on him. The appellant is forty-nine years old. He has been convicted many times, but during the last few years he has been sentenced only to short terms of imprisonment. There are serious objections to passing a severe sentence on a man for an offence intrinsically not grave merely because at some earlier time he has committed a grave offence. It is quite true that in 1913 the appellant was sentenced to four years' penal servitude, but, in view of all the facts and the record of the appellant during the last fourteen years, we think that this sentence might properly be reduced to one of eighteen months' hard labour.

Sentence reduced.

G. B.

GEORGE DINSDALE.

On the trial of the allegation that prisoner is a habitual criminal, the jury must not be directed that they have no alternative but so to find.

Appeal against conviction as a habitual criminal and sentence.

Appellant was convicted on April 12th, 1926, before the Chairman at the West Riding Yorkshire (Wakefield) Sessions of larceny, and was sentenced to three years' penal servitude. He was also found to be a habitual criminal and was sentenced to five years' preventive detention.

Appellant in person.

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20 *May.*

GEORGE DINSDALE.

Hewart L.C.J.
Salter J.
Finlay J.

Ronald Powell for the Crown. I do not propose to support the summing-up of the Chairman on the trial of appellant on the charge of being a habitual criminal, but I suggest that this is a case in which the proviso to s. 4 of the Criminal Appeal Act, 1907, might be applied. Since 1911 appellant has been convicted thirteen times on nineteen separate charges, and on some of these occasions other cases were taken into consideration. He has served seven sentences of imprisonment and two of penal servitude. He had only been out of prison eleven days before he committed the larceny for which he was sentenced on April 12th, 1926.

The LORD CHIEF JUSTICE: In view of the record of the appellant it is impossible to say that the sentence of three years' penal servitude which was passed on him for larceny was excessive. No doubt there were materials on which he might have been found to be a habitual criminal. But the Chairman in his summing-up told the jury in terms that they had no alternative but to find the appellant to be a habitual criminal. The jury may never have directed their minds to the real question which they had to decide. It has been urged that in view of the appellant's record there was no miscarriage of justice, and that on a proper direction the jury must inevitably have come to the same conclusion. They might have done so, but it cannot be said to be certain that they would. It is a strong thing to tell a jury that they have no alternative but to find that a prisoner is a habitual criminal. The Court is of opinion that the finding cannot stand, and it and the sentence of preventive detention are quashed.

Conviction as habitual criminal quashed.

G. B.

EMANUEL HYMAN.

1926
20 *May.*

Hewart L.C.J.
Salter J.
Finlay J.

Conviction quashed in view of misdirection and of absence of legal proof.

Appeal against conviction.

Appellant was convicted on April 12th, 1926, before the Recorder at Merthyr Tydfil Borough Sessions, of receiving stolen goods, and was sentenced to nine months' imprisonment in the second division.

Bertram Long for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was convicted of receiving stolen railway chairs, but the prosecution never proved the theft of the chairs. Nor were the jury directed on the law relating to the receiving of stolen goods.

Ronald Powell for the Crown. While, admittedly, there was no direction on the law, appellant was represented by counsel and all that could be said on his behalf must have been urged. In view of that and of the facts of the case, it is submitted that the proviso to s. 4 of the Criminal Appeal Act, 1907, might be applied here. There was evidence of the theft of the goods, and that appellant knew that they were stolen.

The Lord Chief Justice: There are only two objections to this conviction, but they are serious. In the first place, it was necessary to show that the property referred to in the indictment had been stolen; but that was not proved. In the second place, it was necessary to explain to the jury the position of a person who receives recently stolen property, but no such explanation was given. This conviction must be quashed.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER, AND MR. JUSTICE FRASER.

1926
7 June.

ALBERT WARD.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on May 5th, 1926, before the Chairman, at Middlesex Sessions, of larceny, and was sentenced to twenty-two months' imprisonment with hard labour.

Appellant in person.

Ronald Powell for the Crown.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment that charged him and another man, who was also convicted, with stealing timber. According to the note on the indictment, the note made by the Chairman, and the note made by the clerk of the Court, the Chairman sentenced the appellant to twenty-two months' imprisonment with hard labour. But according to the shorthand note the sentence was one of eighteen months' hard labour. It is suggested that the reason for that discrepancy is that during the discussion regarding what sentence it would be appropriate to pass on the appellant, one of the justices mentioned eighteen months' imprisonment with hard labour in a tone so audible that the shorthand writer made a note of it, and the appellant heard it. In these circumstances the note of the Chairman must decide the matter, and there can be no doubt that the sentence which was passed on the appellant was one of twenty-two months' imprisonment with hard labour. Regard being had, however, to all the circumstances of the case, and to the previous

record of this young man, we are of opinion that this sentence may properly be reduced to one of twelve months' imprisonment with hard labour.

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ALBERT WARD.

Hewart L.C.J.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER, AND MR. JUSTICE WRIGHT.

JENNY BUTLER.

14 *June.*

Breach of a recognisance must be strictly proved.

Appeal against sentence.

Appellant was convicted on May 21st, 1926, before the Chairman, at London Sessions, of "receiving," and was bound over. On April 27th, 1926, after having been brought up and charged with having broken her recognisance, she was sentenced to three years' detention in a Borstal institution.

Bryan for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was bound over on condition, *inter alia*, that she led an honest and industrious life. When she was brought up charged with having broken her recognisance in that she had not led an industrious life, the only evidence in support of that contention was a statement by a probation officer to the effect that the appellant had left certain situations found for her, but the employers were not called, and a letter from her father, who also was not called as a witness. The letter, however, was read, and in it the father stated that appellant had been out of work for a considerable period and that she was not trying to get work.

[He was stopped.]

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Alan Rose, for the Crown, said that he had been instructed not to support the sentence.

The LORD CHIEF JUSTICE: When the appellant was brought up and charged with having broken her recognisance her father's letter was read as if it were evidence of the truth of the statements contained in it. In other words, that was treated as evidence which was not evidence. It is right to emphasize what has been said more than once, namely, that where a breach of recognisance is alleged it must be clearly proved in circumstances which give the defendant a sufficient opportunity of dealing with the issue as if it were an ordinary criminal charge. In the opinion of the Court there were here no materials on which it could properly be found that there had been a breach of recognisance, and the sentence passed on the appellant must be quashed.

Sentence quashed.

G. B.

DANIEL DAWSON.

When defendant offers an explanation of being in possession of property recently stolen, the jury must be directed to consider whether or not they accept that explanation.

Appeal against conviction and sentence.

Appellant was convicted on May 5th, 1926, before the Chairman, at Middlesex Sessions, of "receiving," and was sentenced to five years' penal servitude.

Vine for the appellant, who was present. Appellant was convicted of receiving a stolen fur coat and other things. About twenty-four hours after the theft a man named West was seen to enter a public-house carrying a basket. He left the public-house some two minutes later, and police officers then found appellant sitting in the public-house with the basket at his feet. They called him out, and he took the basket with him. On asking him what was in the basket appellant replied, "Have a look." The officers looked and found the fur coat. When appellant was

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taken into custody he resisted arrest violently. West was also arrested. On the way to the station appellant offered the police 10*l.* to let him go, and when charged he made no reply. He had more than 10*l.* on him. His explanation of the matter at the trial was that West had asked him to "keep an eye" on the basket while he (West) called at another public-house. There was no evidence to show that the appellant's explanation of how the basket came into his possession was untrue, and further, in summing-up, the Chairman failed to distinguish between the cases of the two prisoners, which he should have done with extreme care, as the evidence against each was of a totally different character.

[He was stopped.]

Bickmore for the Crown. The summing-up was substantially accurate and sufficient.

SALTER J., stated the facts, and continued: Where there is a charge of knowingly receiving stolen goods, and the accused person is found in possession of recently stolen goods, there may be circumstances tending to show that when he became possessed of them he must have had guilty knowledge. For instance, the goods may be found to have been concealed by him. There were no such circumstances here. Again, in receiving cases, if the accused person gives an explanation which accounts, or attempts to account, for his possession of recently stolen goods, the onus of proving possession with guilty knowledge is always on the prosecution. The accused person is entitled to be acquitted not only if the jury are satisfied that his explanation is true, but also if they think not that it must but that it may be true, since in that case the prosecution has not discharged the *onus* which is on it. To convict they must be satisfied that it is untrue, and that on the evidence. There was no evidence here that the explanation given by the appellant was untrue. All the facts of his possession agree with his evidence, which is not improbable on the face of it. No general rules can be laid down, but his resistance to arrest, his silence when charged, and his attempt to bribe the police, is not evidence on which the jury could be asked to find that his explanation was untrue—although it was for these matters that the learned Chairman declined to withdraw the case from the jury.

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Especially it would be a dangerous doctrine to presume guilt against a man who is silent when he is charged. We are of opinion that there was no evidence of guilty knowledge on the part of the appellant, which ought to have been left to the jury.

With regard to the summing-up, it is not always sufficient in a direction to the jury merely to make a perfunctory statement of the law. The learned Chairman's law was correct, but was laid down in a rather unsatisfactory manner. The jury must understand the law and must be assisted to apply it. Here there was no proper assistance given to the jury on the main point which they had to determine, namely, whether there was anything to justify them in being satisfied that the appellant's account of the transaction between him and West was not, and could not be, true. Moreover, in answer to a question by the jury, utterances by West were wrongly attributed by the Chairman and the counsel for the prosecution to the appellant. The question whether these two men were strangers or previously acquainted was a matter of vital importance, yet the Chairman said Dawson spoke of West as his "pal." When the prisoner asked about this, as the jury was going out, counsel for the prosecution repeated the error, but the clerk of the Court said "West said that." It is difficult to imagine a state of things more unsatisfactory. The substance of it is that the summing-up began and ended with a suggestion that Dawson had said that he and West were friends. Dawson made no such admission, and what West said had no necessary reference to Dawson. For these reasons this appeal must be allowed.

Conviction quashed.

G. B.

Solicitor for Appellant—*A. Ross Dagg.*

The Court (the Lord Chief Justice, Branson and Finlay JJ.) also sat on June 18th.

BEFORE

MR. JUSTICE SANKEY, MR. JUSTICE TALBOT AND MR. JUSTICE MACKINNON.

FREDERICK ARTHUR LAMBERT.

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28 *June.*

Mitigation of sentence in view of previous good character.

Appeal against sentence by leave of the Court.

Appellant was convicted on May 11th, 1926, before the Recorder at the Central Criminal Court, of larceny and conversion, and was sentenced to three years' penal servitude.

Hemmerde, K.C., and *Graham Mould* for the appellant, who was present. The appellant is forty-two years of age and a married man with three children. In 1902 he entered the service of the firm of stockbrokers in whose employment he was at the time of the prosecution. In 1914 he enlisted, having a splendid record in the war, and, after being taken prisoner by the Germans, doing most valuable work in Darmstadt Camp. After the Armistice he returned to his original employers. In 1922, with another man, he began to deal on a "carry over" account which became unprofitable, and the other man ceased to operate with the appellant. Later, the appellant introduced to his employers a man who was likely to be a valuable client, but who complained that the appellant "never put him on winners." The appellant seems to have decided to carry out a number of transactions about the success of which he was confident in the client's name, so as afterwards to be able to tell him that he had made a lot of money for him. In 1924 the appellant, to liquidate a loss on the "carry over" account, sold a £1,000 conversion bond which had been bought in the client's name, and eventually his total defalcations amounted to £7,000. There was no evidence of extravagant living by the appellant, nor that he benefited by his frauds to the extent of a penny, nor that he gambled,

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except that he was connected with the "carry over" account. It is submitted that a sentence of three years' penal servitude was quite inappropriate to facts of this nature. It is, moreover, quite inconsistent with lesser sentences which the Recorder of London has since passed in more serious cases.

The Crown was not represented by counsel.

SANKEY J.: The appellant pleaded "Guilty" to an indictment charging him, in the first count, with stealing a valuable security, namely, a £1,000 4½ per cent. conversion bond, and, in the second count, with converting the same to his own use. He was sentenced to three years' penal servitude. His counsel asks us to exercise the quality of mercy. We do not think that that argument can be addressed to this Court. Mercy is the prerogative of the Crown and is not for us. The business of this Court is to see that a trial has been properly conducted with due legal form and that the sentence is not wrong in principle. It is not for us to say what sentence we ourselves would have passed. Nor is it possible for us to take into consideration sentences which have been passed in other cases. Each case depends on its own facts. We cannot say that because A. gets a certain sentence for a crime, B. should get the same or a less sentence for the same crime which has, nevertheless, been committed in other circumstances. Having regard, however, to the whole of this case—the fact that the appellant put none of the money into his own pocket, his good character, the length of his employment, and the fact that his employers do not wish to press the charge—we have come to the conclusion that this sentence may properly be reduced to one of twelve months' imprisonment in the second division.

Sentence reduced.

G. B.

Solicitors for the Appellant—*Mawbey & Barrie.*

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On the trial of an indictment containing counts for various offences against individual defendants, and one for conspiracy against them all for all or some of those offences, especially when there are many counts and a long trial, the greatest care must be taken in directing the jury on each count and its relation to the count for conspiracy, and if the conspiracy count fails, that evidence on any given count may not be evidence against all defendants: in this sense it is a misdirection to say: "You must take the case as a whole and not in bits."

Dictum *of Cockburn, C. J., in* Boulton and Others, 12 *Cox, C. C.* 93, *that when a definite crime is charged it is undesirable to charge also a conspiracy to commit it, commented on.*

Appeals against conviction, and applications for leave to appeal against sentence.

Appellants were convicted, after a trial lasting nine days, on May 3rd, before the Common Serjeant, at the Central Criminal Court, of conspiracy to defraud and of obtaining, and attempting to obtain, goods by false pretences. Jacob Luberg was sentenced to three years' penal servitude and ordered to pay the costs of the prosecution not in excess of 250*l.* Philip Luberg was sentenced to six months' imprisonment in the second division. Harry Archibald Luberg was sentenced to eighteen months' imprisonment with hard labour.

Sir Henry Maddocks, K.C., *Eustace Fulton* and *H. H. Maddocks* for appellants.

Comyns Carr, K.C., and *H. D. Roome* for the Crown.

The facts and arguments appear fully in the judgment of the Court, which was as follows:—

Sankey, J.: The appellants, Jacob Luberg, Harry Archibald Luberg and Philip Luberg, were convicted at the Central Criminal Court, before the Common Serjeant, upon an indictment which charged them in the first count with conspiring, between the 1st of July and the 30th of November, 1925, to cheat and defraud persons who should supply goods on credit to Smart's (London), Limited. It was said that they conspired together by divers

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false-pretences and other unlawful ways and means to obtain and acquire to themselves divers large quantities of furs, silk and woollen goods. They were further charged on eight counts with obtaining, and on three counts with attempting to obtain, goods by false pretences from eight persons. The appellant, Jacob Luberg, was sentenced to three years' penal servitude and ordered to pay the costs of the prosecution up to 250*l.*; the appellant, Harry Archibald Luberg, was sentenced to eighteen months' imprisonment with hard labour; and the appellant, Philip Luberg, to six months' imprisonment in the second division. All of them appeal against conviction and sentence.

Jacob Luberg is a man who came over here from Poland many years ago, but has not been naturalised. His sons were all born here, and the two to whom I have referred were, with their father, directors of Smart's (London), Limited.

The case for the prosecution, shortly stated, was that Smart's (London), Limited, was not at the material time a prosperous company and that, in its later stages, it was hopelessly insolvent, that Jacob held a debenture for 4,000*l.* in the company, and that at one time there were not sufficient assets to secure it, that that debenture was pledged with the bank, and that between August and November (when the company ceased to exist) the appellants purchased for the company on credit a much larger amount of materials than they could use for manufacture; that they disposed of them and thereby were enabled to pay off the overdraft at the bank and to obtain the release of the debenture which was deposited as security.

These charges were spoken to by three classes of witnesses. The first class were those who produced documents and spoke to the dealings of the company as they appeared in various books and accounts; they consisted of official witnesses from the liquidator's office and certain accountants. There were witnesses representative of the firms from whom goods were alleged to have been obtained by false pretences, and two witnesses who had been employed by the company, a man of the name of Wood, the manager, and a Miss Rose, now Mrs. Lavis, who was the book-keeper. In effect, the case for the prosecution was that this was a long firm fraud, that these men conspired together and got goods that might be made up into garments, but that they did not send the goods to the outworkers, but to a company, which was really

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their, or Jacob's, own company, called the Anglo-French Company. The prosecution drew attention to the fact that a large sum of money was paid into the bank, and that the overdraft incurred by Jacob was paid off, and they said that there were certain alterations made in the minute book which were fraudulent, and so forth. Counsel for the prosecution said that the case was a strong one because they had not only evidence from the outside, which in most cases of this character is all the evidence that can be procured, but they also had evidence from the inside, because they were able to call the two persons, Wood and Miss Rose, to whom I have already referred.

The defendants went into the witness-box and they were cross-examined. They called their own accountant, and, after a long trial of many days, they were convicted, and the sentences which I have already detailed were passed on them.

Several grounds of appeal were taken. It was, first of all, said that there was no evidence upon which the jury could or ought to have found that the appellants were guilty of conspiracy. It was said that, if that was correct, the case against the two sons must fail. That, I think, was the opinion of the learned judge who heard the case, and who, in charging the jury, said: "Now with regard to all the counts except the first, if you do not think that the conspiracy is proved, then, as I have said, there is no evidence of any representations made by either of the sons. Therefore, if you think that these representations were made by Jacob and that they were false, and that he knew them to be false, and that the goods were supplied to him in consequence of that belief, then he would be liable criminally upon the counts for obtaining money by false pretences, but the sons would not; but if you believe that the conspiracy has been proved and that these representations were made by Jacob in pursuance of that conspiracy, all three prisoners are equally guilty upon the counts charging them with obtaining money by false pretences."

We have had the advantage of a very careful analysis of the evidence by counsel on both sides, and, although in respect of two of the counts charging false pretences there is some evidence against one of the sons of a very slight character, we think that the direction of the Common Serjeant is correct—that if the conspiracy were not proved there was really no evidence of representations made by either of the sons.

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The counts of the indictment to which I have already referred are as follows. There is, first, the general count, charging conspiracy to defraud. Then there are a number of counts alleging obtaining money by false pretences, the false pretences being "by falsely pretending that a genuine and honest business then was being carried on at 142, High Street, Shoreditch, in the name of Smart's (London), Limited, and that the said Smart's (London), Limited, then was a prosperous and solvent company, and that the said goods were then honestly required by the said company for the purpose of executing orders then in hand." The second count related to a man of the name of Silver, the third to a man of the name of Kesler, the fourth to a man of the name of Levy, the fifth to a man of the name of Rudd, and the sixth to a man of the name of Finegold; the seventh charged the prisoners with obtaining goods from a Mr. Alberg by false pretences; the eighth with attempting to obtain goods by false pretences from Alberg; the ninth with obtaining goods by the same false pretences from a man of the name of Polsky; the tenth with an attempt to obtain goods by such false pretences from Polsky; and the eleventh and twelfth with obtaining and attempting to obtain by these false pretences goods from a man of the name of Feldman.

I want to say a word before I discuss the evidence with regard to the general character of the allegations. Counsel for appellants has pointed out that the actual words of the alleged false pretences were not used, or, at any rate, not in all cases used to the various persons from whom the goods were obtained. I do not think that that is a well founded criticism. I think that they were general words which were proved, or sought to be proved, by specific instances, for example, by proving that, in some cases, the words used were that the company could "pay 25*s*. in the pound." Therefore, I do not think that the way in which these particulars are set out can be criticised in the manner in which Sir Henry Maddocks desires to criticise it.

But we do desire to say one word about the whole indictment. It will be observed that it starts with the general count for conspiracy. I am far from saying that that is wrong. It is perfectly open to prosecutors to do that, but it does, in our judgment, place the defendants in a case like this in some difficulty. The reason is that it renders admissible evidence of what one prisoner says in the absence of the others, because if they are all

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conspirators, what one of them says in furtherance of the conspiracy would be admissible evidence, even though it was said in the absence of the other conspirators. This is not only my own opinion. There is the well-known case of *Boulton and Others* (12 Cox, C. C. 87: 1871), where Cockburn, C. J., in summing-up, refers to this procedure and says (at p. 93): "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses." It is perfectly true that that case was different from the present one. It is equally true that since the decision in that case an Act of Parliament has been passed which enables a prisoner to go into the witness-box and give evidence. It is a perfectly admissible and proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear. I do not wish to be misunderstood. The practice followed with regard to this indictment is a perfectly legitimate practice to pursue, but it is a practice which, if pursued, needs great care on the part of prosecuting counsel and great care in the judge who sums up the case to keep the issues perfectly clear. In this case, as I have already pointed out, the judge told the jury: "If you do not think that the conspiracy is proved, then, as I have said, there is no evidence of any representations made by either of the sons," but meanwhile a great deal of evidence had been let in which, if there had been no conspiracy charge, might or might not have been admissible against the various defendants.

That being the nature of the case, we have got to see whether there is any evidence to justify a conviction on the first count. The summing-up, I wish to say at once, is an extremely fair summing-up, and, after a very complicated trial of many days, a

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most admirable summing-up by the Common Serjeant. He states the law, in my view, quite unexceptionally; he sets out the case for the Crown and the case for the defence; he deals fully with the finances of the company, with regard to which a great deal of evidence had been given—its balance-sheets, minute books, and so forth, and its bank books had been put in; he discusses all the evidence given by the various witnesses of false pretences; and he deals with the evidence of Rose and with that of Wood. He then sets out at length the evidence given by the three defendants. I say that to show that it was a full and comprehensive summing-up.

When the case comes to this Court it comes in rather embarrassing circumstances, because the task imposed on counsel for the appellants is a difficult and a lengthy one. He has to show that there was no evidence upon which the jury could come properly to the conclusion, after a proper summing-up, that the defendants could be convicted upon the conspiracy count. In other words, he has to prove a negative, and that means reading a considerable amount of evidence. We endeavoured to shorten it by asking counsel for the Crown to indicate what he said was the evidence, and afterwards asking counsel on the other side to reply to that, giving the former a further opportunity of saying anything he desired to. It is easy in a case like this quite unintentionally to give evidence of matters which are not legally admissible in evidence. It was a nine days' trial, and a great number of books had to be examined. The material period, as I have already pointed out, is between the first day of July and the thirtieth day of November, 1925. One of the complaints of counsel is that matters long before that date were discussed and taken into consideration which had nothing to do with the case at all. I am not blaming anybody, because in a long trial like this it is extremely difficult to remember accurately all that has taken place, but over and above that it is clear that in respect of several of the counts for obtaining goods by false pretences there was no evidence at all. Counsel for the Crown, with his usual fairness, when he was asked about these counts, said that counts 6, 11 and 12 were abandoned. They could not be supported. It is unnecessary in those circumstances for me to point out that there was no evidence in respect of those counts, and indeed that appears to me to be the result if you look at the summing-up of the judge, who says: "If the conspiracy is not proved then you have still got to consider

whether Jacob did in fact make gross fraudulent misrepresentations with regard to the position of the company. . . . In that case some of the counts have not been proved, but the ones that have been proved are counts 2, 3, 7, 8, 9, and 10." I do not desire to be hypercritical, but, in fact, Jacob has been found guilty on all of them, although the judge pointed out there was no evidence in respect of certain counts, and counsel abandoned them here.

We have looked very carefully into the matter, and we think that there is also no evidence on count 4. With regard to count 2, it stands in a somewhat unsatisfactory position, because Silver did say when he was cross-examined that he had not relied upon the representations set out as false pretences in the count, but on what he saw when he was taken to see Jacob's property at a place called Russia Lane. He was asked: "Again, I ask you, for about the fourth time"—no doubt it will be on the notes—"were the goods you supplied after August supplied by you because you relied upon what you had seen at Russia Lane?" He answered: "Yes, sir." It is perfectly true that in re-examination he varied that answer, but I do not see that in the summing-up attention was directed to that. It is no fault of the judge; he cannot direct attention to everything. That is count 2, and we think that count 4 cannot stand. Counts 6, 11 and 12 admittedly cannot stand, so we start with this, that admittedly on three of the counts upon which Jacob was found guilty the conviction cannot stand.

The reason I have gone into that is to discuss—quite briefly, I hope—count 1, the important count. We think that, for the jury to be correct in finding a verdict of guilty on count 1, it must be shown that the two sons knew what was going on and that they did act in a conspiracy. The judge does not, I think, at the end of his long summing-up, in one way put it quite correctly, where he says: "That is the whole case and you must take it as a whole and not by bits." I am not saying that that is a wrong direction in ordinary cases, but I do say that in a case where you start with a conspiracy charge which makes, as I have pointed out, the evidence given by one prisoner in the absence of another evidence against that other, it is not wholly satisfactory to say, "You must take it as a whole and not by bits." The judge goes on to say: "First of all, is the conspiracy proved here entirely to your satisfaction? Did the sons know that these matters were going on?"

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I do not wish to be hypercritical, but, after all, the question is: "Was it proved that they knew?" It is to be observed that the conspiracy is a conspiracy to obtain these goods by false pretences, and the man who made the false pretences in every case, except perhaps the two small cases which I have referred to where Philip was concerned, was Jacob himself. The sort of way in which that knowledge was desired to be imputed to the other defendants was that they were at the business every day, that they knew how things were going on, that one of them was the secretary of the company and the other the traveller. The jury were asked to say (1) "They must have known." (2) "They did know." I do not think that there is any direct evidence to connect the two sons with making the false pretences other than what I have already referred to. Giving the best consideration we can to the case we have come to the conclusion that there was not evidence upon which the verdict on count 1 can be supported.

In addition to the matters to which I have referred, a considerable amount of evidence was given of the way in which the father, Jacob, had behaved, and of the manner in which the company was conducted. There was the item—I am not going through them all at this late period of the day—of the wages, and that of the travelling expenses. It seems to us that those questions really were evidence of the general bad character of Jacob and were really not admissible. They were objected to in the beginning by his counsel. He could not do more than that, but, having regard to the facts that there was no direct evidence, that admittedly three of the counts had to be abandoned, and that we think two others must also be abandoned, and having regard to the other matters that I have pointed out with regard to this summing-up, we come to the conclusion that this trial was not a satisfactory one. It is impossible to say what would have been the result if these issues had been kept apart. I cannot think for one moment that there would have been a conviction against either of the sons.

There is some evidence against the father in respect of the other counts, but there again, having regard to the irrelevant topics which we think were introduced, and having regard to the way in which this case was conducted, it looks rather as if what happened was that a great volume of evidence was thrown at the heads of the jury, who formed their opinion without really having sufficient evidence, or without sufficient direction, on what facts they

could convict. We think with regard to the sons that there were no such facts, and, although in respect of the other counts there was some evidence against Jacob, we think that the conviction against him, too, ought to be quashed because of the irrelevant topics which were introduced and the manner in which the evidence was looked at as a whole without strictly confining it to each particular count. In the result, therefore, the appeals are allowed, and the convictions must be quashed.

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PHILIP LUBERG.
HARRY ARCHIBALD LUBERG.

Sankey J.

Convictions quashed.

Solicitors for Appellants—*A. W. Woolf & Co.*

G. B.

BEFORE

MR. JUSTICE SANKEY, MR. JUSTICE ROCHE AND MR. JUSTICE SWIFT.

JOSEPH EDWARD FLAVELL.

12 *July*

This Court has no power to alter the "Rules in Macnaughton's Case."

Application for leave to appeal against conviction, treated as a final appeal.

Appellant was convicted on June 9th, 1926, before Avory J., at Worcester Assizes, of murder, and was sentenced to death.

Sir Edward Marshall Hall, K.C. (with him *A. J. Long*), for appellant. Appellant was convicted of the murder of his step-brother, a lad of fifteen. His family has a remarkable history of mental instability, and his defence at the trial was that of insanity. The jury were invited to return a verdict of "guilty, but insane," under s. 2, sub-s. (1) of the Trial of Lunatics Act, 1883, but they returned a simple verdict of "Guilty." This Court, however, has power to substitute a verdict of "guilty, but insane," under s. 5, sub-s. (4) of the Criminal Appeal Act,

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JOSEPH EDWARD FLAVELL.

Sankey J.
Roche J.
Swift J.

1907. Insanity for criminal purposes has been determined for the last eighty-three years by the rules in *Macnaughton's Case* (4 St. Trials (N. S.) 847; 10 Cl. & F. 200: 1843), but since then medical knowledge of insanity has progressed enormously. The law has progressed not at all—the definition of "lunacy" in the Lunacy Act, 1890, that a lunatic is an "idiot or person of unsound mind," carries the matter no farther—and, as Lord Dunedin said in *H. M. Advocate* v. *Brown*, 1907, S. C. 67 at p. 76; 44 S. L. R. 634 at p. 639, "no one can say what insanity is." Two years ago the Commission presided over by Atkin L.J. to inquire into these matters published their report, in which they recommended that the law should recognise irresponsibility as a defence on the ground of insanity where the act has been committed under an impulse which the prisoner by mental disease was prevented from controlling. The legislature has not intervened, and this Court should, therefore, put a new interpretation on the rules in *Macnaughton's Case* so that they are made compatible with the discoveries of science. In summing-up, Avory J. dealt with the matter in the narrowest possible sense. He told the jury that the only question which was for them was whether appellant, when he committed the murder, "knew that he was doing what was wrong." The proper direction would have been that they should consider whether he knew that he was committing murder or whether he thought that he was committing some other act which was wrongful but of a less grave character. The summing-up was also defective in other respects.

W. S. Morrison for the Crown was not called on.

SANKEY, J.: The defence raised at the trial of the applicant was that of insanity, the burden of proving which lay on the defence. Two complaints have been made regarding the summing-up. It has been said (a) that the judge did not accurately state the law, and (b) that there were omissions in his direction. Counsel has said that this was a case of "uncontrollable impulse," and that that should be one of the grounds on which a verdict of "guilty, but insane," can be founded. He said that the time has come when the rules in *Macnaughton's Case* should be not only re-considered but also altered in the light of modern medical opinion, and he asked us to decide that the law

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ought to go beyond what was laid down in *Macnaughton's Case*. We desire to express no opinion on the desirability of altering the law, or whether it should be altered by legislation or by pronouncements in this Court. But we do say not only that the rules in *Macnaughton's Case* stand at present, but also that if we were to alter them to give effect to the contentions of counsel we should be going further than interpreting those rules. We should also be expressing an opinion contrary to a great number of cases which have been decided by this Court.

We cannot, therefore, give effect to the first contention. We are of opinion that the judge gave a fair, accurate and proper direction on the law, and, with regard to the second contention, that, although the judge did not go through every sentence of the evidence, he dealt with it generally at considerable length, and nothing in the summing-up can be criticised adversely. It contained a sufficiently ample statement of the facts. We think, therefore, that the only judgment possible in this case is to refuse the application. It is open to the Home Secretary to make such inquiries as he thinks necessary.

We were asked to exercise the power given us by s. 5, sub-s. (4) of the Criminal Appeal Act, 1907, to substitute a verdict of "guilty, but insane," for one of "Guilty." We wish to point out that only in very exceptional circumstances does this Court feel inclined to take that course.

Application refused.

Solicitors for Applicant—*Timbrell and Deighton.*

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

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CHARLES EDWARD FINDEN.

A statement by a defendant's wife to third persons is not evidence against the defendant on his trial of the facts therein contained, but may be given in evidence with his remarks on them when it is repeated to him.

Application for leave to appeal against conviction, treated as a final appeal.

Applicant was convicted on July 6th, 1926, before Roche J., at Winchester Assizes, of murder, and was sentenced to death.

A. H. Armstrong for the applicant (under s. 10 of the Criminal Appeal Act, 1907), who was present. It is submitted that the conviction of the applicant should be quashed on the ground that evidence was admitted against him which was in law inadmissible. Applicant was charged with killing a boy who was proved to have been paid 15*s.* by his employer in the form of a 10*s.* note and two half-crowns shortly before the murder. In answer to the police applicant stated that on the day before the murder he gave his wife certain money. The police interviewed the wife, and as a result applicant was told that she had said that in addition to the money given to her on the day before the murder he had given her 17*s.*—consisting of a 10*s.* note, two half-crowns and a two-shilling piece—on the day of the murder, and that he had told her that he had earned the money at a tennis club, which was untrue. Evidence by the police of these matters and applicant's replies thereto were admitted. That was wrong, because it is the policy of the law that in a charge of this sort the evidence of a prisoner's wife cannot be given against him without his consent, and here, in effect, evidence by the wife was indirectly given which could not have been directly given. The communication

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between the applicant and his wife was privileged, and his admission that his wife's statements were true did not waive that privilege: *Parmenter*, 12 Cox C. C. 177: 1872. If applicant had taken the initiative and said to the police "Go and enquire from my wife about these matters," different considerations would apply: in *Mallory*, 13 Q. B. D. 33; 15 Cox C. C. 456; 48 J. P. 487; 53 L. J. M. C. 134; 50 L. T. 429; 32 W. R. 721: 1884. C. C. R., prisoner himself referred the police to his wife, and she in his presence handed a list to them; he said nothing; this was held to be admissible against him. Further, the evidence against applicant was purely circumstantial, and the summing-up should have followed the form of that in *Hodge*, 2 Lewin C. C. 227: 1838, which has been approved in Russell on Crimes (8th ed.), Vol. II., p. 1895, and Halsbury's Laws of England, Vol. IX., p. 588. Here the judge merely directed the jury that the circumstances must be consistent with applicant's having committed the crime.

Charles, K.C. (with him *T. J. O'Connor*), for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The chief ground of complaint, as I understand it, is that certain statements made by the appellant's wife to a police officer, and repeated to the appellant, together with the observations which the appellant then made, were mentioned, and it is said ought not to have been mentioned. That matter was argued at the trial, it was argued most properly in the absence of the jury, and when the jury returned the learned judge, as appears from the transcript, was careful to direct the jury fully upon the matter. I quote his very words: "I want to tell the jury something now. You want to be very careful to remember throughout this case that the evidence of the officer about what the wife told him is not evidence at all against the accused. The only reason why it is mentioned is that it leads up to a statement of the accused which is important. You will ignore the statement of the wife, which was only a step in arriving at something which he did." That was the proper direction to give to the jury. It is said that that is not enough, that the remarks of the appellant proved and brought about in that fashion ought to have been excluded, but there is no ground for that contention. The state-

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ments which he made in those circumstances being made by the accused person were just as much evidence against him as statements made by him in some other circumstances. The mere fact that it was upon observations said to have been made by his wife that he made these admissions is immaterial.

It is further said that the judge did not sufficiently warn the jury of the pitfalls offered by cases which depend on circumstantial evidence. But it is apparent, when one looks at the summing-up as a whole, that the judge's direction to the jury on the evidence was adequate and fair. The Court has been asked to order that the evidence of two further witnesses be heard to-day, but it appears that those two witnesses were known to those who were responsible for the defence, not merely at the trial, but before the case for the prosecution had come to a close, and it is apparent from the statement that has been made about the evidence which, if called, they would be prepared to give, that they cannot throw any further useful light upon this matter.

The learned judge in the course of his summing-up referred to the impression which the case had made upon his mind, and at the conclusion of the matter he was constrained to say to the jury of their verdict that it was a verdict at which in his opinion they had justly arrived.

Application dismissed.

G. B.

ARTHUR TAYLOR.

On the trial of an allegation that prisoner is a habitual criminal the direction that if the three statutory convictions are proved, he must be so found, is incorrect: his whole career must be considered by the jury.

When a court in passing sentence takes into account charges pending in another court, the latter ought to be informed thereof, before passing sentence upon such other charges.

Appeal (on certificate) against conviction as habitual criminal, and against sentence.

Appellant pleaded guilty on June 5th, 1926, before the Chairman, at the Middlesex Sessions, to housebreaking and was con-

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victed of being a habitual criminal, and was sentenced (originally to four years' penal servitude and four years' preventive detention, but finally) to three years' penal servitude and five years' preventive detention.

Albert Crew for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The conviction of appellant as a habitual criminal was wrong. One of the three previous convictions charged against him in accordance with s. 10, sub-s. (2) (a) of the Prevention of Crimes Act, 1908, was one at Margate Sessions on January 12th, 1924, for housebreaking, when he was sentenced to three years' penal servitude consecutive to a sentence of three years' penal servitude which he was already serving. The sentence passed at Margate was made concurrent with the other sentence by an order of the Court of Criminal Appeal (18 Cr. App. R. 25) on the ground that in December, 1923, the Chairman of the London Sessions, when sentencing appellant to the first term of three years' penal servitude, intended that sentence to cover the Margate offences. In those circumstances, the last-named offences had been dealt with at London Sessions; the conviction of them should not have been included in the statutory notice served on appellant, and proof of it was no ground for his being found to be a habitual criminal. Further, the Chairman misdirected the jury in telling them that once the three convictions mentioned in the notice were proved, the *onus* was on appellant to prove that he had not been leading a dishonest or criminal life.

[He was stopped.]

Turrell for the Crown. There was sufficient evidence before the jury on which they could properly find that he was a habitual criminal.

AVORY J. (*a*): This appellant pleaded guilty at the Middlesex Sessions to a charge of housebreaking, and he was convicted of being a habitual criminal and was sentenced to three years' penal

(*a*) Reprinted from a transcript supplied by the courtesy of the Director of Public Prosecutions.

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servitude and five years' preventive detention. He now appeals against the conviction as a habitual criminal on a certificate granted by the Chairman, and he also appeals against the sentence both of penal servitude and of preventive detention.

The certificate of the learned Chairman is to this effect: "Counsel for the appellant challenged the validity of one of the three convictions charged against the appellant, in accordance with s. 10, sub-s. (2) (a) of the Prevention of Crime Act, 1908. The conviction challenged was one for housebreaking, at the Margate Borough Sessions, on the 12th January, 1924," on which occasion he had been ordered to be "kept in penal servitude for three years, to commence at the expiration of the sentence of three years" which he was then serving.

The learned Chairman goes on in his certificate to say this: "During the argument, it appeared that Taylor had appealed against the Margate conviction on the ground that the learned Chairman at the County of London Sessions in December, 1925, had, at the request of the appellant, 'indirectly taken into consideration the Margate charges, which he had then admitted.' My attention was called to the report of the case in 18 Cr. App. R. 25, in which Mr. Justice Avory in his judgment said: 'It is absolutely clear that the learned Chairman did intend to dispose of the Kent charges, which were admitted. We adhere to our often expressed principle, and quash the second term of penal servitude in so far as it was consecutive, and make it concurrent.'" That is all a quotation from the judgment in the previous case. Then the learned Chairman proceeds: "Under this statement I was unable to understand why, if the prisoner's Margate offences were taken into consideration at the London Sessions, the Recorder's conviction and sentence was allowed to stand, though modified by being made to run concurrently with the London sentence."

We are unable to appreciate the difficulty the learned Chairman found in understanding what this Court had done on that appeal. If he had only borne in mind the difference between a conviction and a sentence, he never could have felt this difficulty at all which he has expressed. He seems to assume that because this Court altered the sentence which was passed at the Margate Borough Sessions, therefore they ought to have quashed the conviction, and consequently his own view was that there was no valid conviction at the Margate Quarter Sessions, merely because this

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Court had altered the sentence which was passed at the Margate Quarter Sessions. It is unfortunate that apparently neither of the learned counsel who were engaged in this case at the Middlesex Sessions was in a position to inform the Court of what had really taken place on the appeal of Taylor, which is reported in 18 Cr. App. Cas.

What in fact had taken place was this: the man, while waiting his trial at the London Sessions for offences committed in London, escaped from custody. He escaped to Margate, and while there he committed other housebreaking offences or burglaries; he was arrested at Margate, he was then taken back to London to be tried for the offences committed in London, and he was brought up at the London Sessions in November, 1923, to be tried for those offences. Some mention was made to the learned Chairman of the offences which he had committed at Margate, and the appellant undoubtedly expressed his desire that those offences should be taken into consideration. But the learned Chairman at the London Sessions had not before him a definite consent on the part of the authorities at Margate to those offences being dealt with or being considered, and the authorities at Margate in fact did not give any actual consent to those offences being taken into consideration. In those circumstances the learned Chairman—I am speaking from my memory now of what took place before us on the hearing of this previous appeal—the learned Chairman at the London Sessions said that in his opinion there ought not to be any further punishment in respect of the Margate offences, and he passed a sentence of three years' penal servitude, although not strictly in law entitled to take them into consideration, because there was no consent by those who were responsible for the prosecution at Margate. But he stated his clear opinion that in his view there ought not to be any further punishment. Then the prisoner was taken to Margate, brought up before the learned Recorder at Margate, and unfortunately the learned Recorder was not informed of what had taken place at the London Sessions. No one there was able to tell him accurately what had taken place, and, judging by some newspaper reports, he was led to believe that those Margate offences had not been taken into consideration by the Chairman of the London Sessions, and so he passed a further sentence of three years' penal servitude, to be consecutive to the other term of penal servitude.

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Now upon those facts being brought to the notice of this Court, we came to the conclusion that that consecutive sentence ought to be altered, and that there should be substituted for it a sentence of three years' penal servitude running from January of 1924, the date of the conviction at Margate, but running concurrently with the previous sentence, so that the result was to increase the sentence of three years' penal servitude by a period of about two months.

If the learned Chairman had known the facts as stated, he never could have said that the sentence which was imposed by this Court was equivalent to quashing the conviction, but that is the impression that he was under, and wrongly under. So that that point fails. There were in this case three previous convictions proved to satisfy the Act.

Now we have to consider, in view of the summing-up to the jury, whether this man was properly convicted of being a habitual criminal. Apart from those three previous convictions the jury had to be satisfied that the man was, at the time when he committed this last offence, persistently leading a dishonest or criminal life. The learned Chairman, in the passage which has been read, in effect told the jury to consider only the period which had elapsed between his coming out of prison on the 26th of April and the time of his arrest on the 6th of May, instead of telling them that they had to consider the record of the man's whole career. Of course, when they came to consider the record of his whole career, the fact that he commits another offence shortly after he comes out of prison is always a most relevant consideration, but the learned Chairman says in more than one passage: "Then it comes to the question which you have to decide as reasonable men; here is a man who comes out of prison, and within ten days he is arrested again on a serious charge. Can you say whether that man has turned over a new leaf or not within ten days? I suggest to you that the period of time is absolutely too short, and that no true deduction can be derived in that short space of time about that man's endeavour to lead an honest life—all we know is that after a period of only ten days he is in trouble again. In my opinion that is the only point you have to consider." That was calculated to mislead the jury. Then the learned Chairman, if he is correctly reported in this shorthand note, makes it still more confusing to the jury, because he says: "I must rule for the purposes of this

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case that the notices of previous convictions are good, which show that he has been persistently leading a dishonest life." In other words, leading the jury to believe that once those three previous convictions are proved, that is sufficient to show that the man is a habitual criminal.

In these circumstances, the Court feels that it cannot allow the conviction to stand as a habitual criminal, and we have to consider only what is the proper sentence for the offence of housebreaking, to which he pleaded guilty. It was an offence committed, undoubtedly, soon after he had come out of prison, and in view of his previous record the proper sentence is a sentence of three years' penal servitude, and that sentence will be substituted for the one that was passed. The sentence will run from the date of conviction.

Conviction as habitual criminal quashed.

Primary sentence reduced.

G. B.

FRANCIS SMITH.

Offences which may lawfully be charged in one indictment ought not to be distributed into more.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty on June 5th, 1926, before the Chairman, at Middlesex Sessions, to burglary, and was sentenced to four consecutive terms of six months' imprisonment with hard labour.

Appellant in person.

Ronald Powell for the Crown.

The LORD CHIEF JUSTICE (*a*): The appellant, Francis Smith, pleaded guilty at the Middlesex Sessions to four charges contained

(*a*) This judgment is printed from a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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in four different indictments of burglary. He was sentenced to six months' imprisonment with hard labour on each indictment, those sentences to be consecutive. He now, by leave of the Court, appeals against his sentence.

With regard to the facts of the cases, it is enough to say that two of those burglaries were committed on the night of the 21st of May, and two of them were committed on the 23rd of May. The appellant is 32 years of age, and, it appears, has been previously convicted once, namely, in January last, when he was sentenced to five weeks' imprisonment as a suspected person found on enclosed premises. The appellant served during the war from May, 1915, to August, 1917, when he was discharged with a good character.

A fact appears in this case which appears far too often, and which has very often been the subject of remark in this Court. There was not the slightest reason in this case why all the charges should not have been included in one indictment. The cases clearly comes within s. 4 of the Indictments Act, 1915, and the third rule under that section, which provides that charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or are part of a series of offences of the same or a similar character. It would be difficult to imagine cases which more clearly come within that rule than these four offences of burglary committed on two successive evenings. If it is suspected, as it appears to be suspected in this case, that the combining of those four charges in one indictment might be prejudicial to the accused, the answer is twofold: first, it is no more prejudicial to be called upon to plead to four counts in one indictment than it is to be called upon to plead to four indictments; and secondly, if it appeared to the court in any particular case that the prisoner is likely to be embarrassed by the simultaneous trial of four different, though related cases, the court would undoubtedly call upon the prosecution to make an election, and to proceed upon one charge only. There is no reason at all why full effect should not be given to the provision in the Act. It is habitually ignored, and no doubt the ignoring of it habitually leads to unnecessary expense.

With regard to this sentence, we are all of the opinion that this sentence ought to be reduced, and there will be substituted for it one sentence of twelve months' imprisonment with hard

labour, and that sentence will run, not from to-day, but from the day upon which this sentence was passed.

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Sentence reduced.

G. B.

CHARLES ENRIGHT.

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Appeal against sentence—Severity of sentence, after previous conviction.

Appeal against sentence.

Appellant was convicted of larceny on May 5th, 1926, before the Chairman, at the Middlesex Sessions, and was sentenced to two years' imprisonment.

Appellant in person.

Ronald Powell for the Crown.

The LORD CHIEF JUSTICE: The conviction and sentence of this appellant are dated May 5th and his notice of appeal June 18th, which is nearly five weeks out of time. The appellant has offered as a reason for his delay the fact that he petitioned the Home Secretary and an unexpected delay occurred.

The appellant and another man, Ward [above, p. 126], were seen to take from a builder's truck timber of about 5*l.* in value. It is unnecessary to repeat the facts of the case further, but, on looking at the record of the appellant, we find that since March, 1922, he has not been charged at all. In 1922 he was sentenced to seven days' imprisonment for fraud; before that he had had some previous convictions, including one for larceny in 1920, in respect of which he was sentenced to eighteen months' imprisonment.

In view of all the circumstances we think that this sentence should be reduced to one of eleven months' imprisonment with hard labour—eleven instead of twelve, because owing to the lateness of his appeal the appellant served some part of his sentence

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before being specially treated as an appellant. Therefore we direct that the time during which he was so treated shall count towards the completion of the sentence.

Sentence reduced.

G. B.

STANLEY ARMSTRONG.

Severity of sentence.

Appeal against sentence, by leave of the Court.

Applicant pleaded guilty to larceny before the Chairman at the Middlesex Sessions on July 10th, and was sentenced to five years' penal servitude.

Applicant in person.

No counsel appeared for the Crown.

SALTER J.: The applicant stole milk from his employer of the value of about 2*l.*, and he also stole two 1*l.* Treasury notes from a fellow servant with whom he was lodging.

The Court is of opinion, in view of all the circumstances, that the sentence passed on him was excessive, and we substitute for it a sentence of eighteen months' imprisonment with hard labour, to be concurrent with a sentence which the appellant is at present serving for another offence.

Sentence reduced.

G. B.

ARTHUR ERNEST BREWIN.

Severity of sentence for "materially contributing to . . . . insolvency by gambling" within s. 157 (1) (*a*) *of the Bankruptcy Act*, 1914.

Appeal against sentence.

Appellant pleaded guilty on June 22nd, 1926, before the Chairman, at Leicestershire Sessions, to gambling within two years

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before the presentation of a bankruptcy petition against him, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person.

The Crown was not represented by counsel.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to a charge under s. 157, sub-s. (1) (a) of the Bankruptcy Act, 1914. He is fifty-one years of age, and for some years he had a grocer's business at Loughborough. On July 1st, 1925, a receiving order was made against him on his own petition, and on the same day he was adjudged bankrupt. The deficiency account showed an excess of liabilities over assets of 243*l*. odd. The appellant stated that he had lost 500*l*. by gambling. His public examination took place in August, 1925, and, in answer to questions, he stated that he had used a lot of the money which he had taken in his shop for betting, and that the chief cause of his failure was his neglect of his business to frequent racecourses and to bet. He was then asked whether he knew that it was a serious thing for a trader to lose a substantial part of his assets by gambling, and he answered "No, I did not." He now says that he has done no betting since 1922. If that statement is true there was no gambling "within two years prior to the presentation of the bankruptcy petition" within the meaning of s. 157, sub-s. (1) (a). In all the circumstances of this case, so far as we know them, we think that the sentence of twelve months' imprisonment with hard labour may properly be reduced to one of two months' imprisonment in the second division, to run from the date of conviction.

Sentence reduced.

G. B.

WILLIAM STITCH TURNBULL.

A term of penal servitude must not be inflicted, merely to found the jurisdiction of the court to impose preventive detention: it must be warranted by the primary offence.

Appellant pleaded guilty at Durham Assizes on June 21st to larceny, and was found to be a habitual criminal. Finlay J.

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sentenced him to three years' penal servitude and five years' preventive detention.

Appellant in person.

Ronald Powell for the Crown.

In the course of his judgment the LORD CHIEF JUSTICE said: Counsel for appellant below laid stress on a statement in a report of a case (*a*) in this Court where it was said that the provision in the Act [Prevention of Crime, 1908] with reference to three years' penal servitude means that the Court must take such a view of the substantive crime of which the prisoner is then convicted as to think it right, by reason of that crime, to pass a sentence of penal servitude and not for any other reason. That, of course, does not in the least suggest that regard is not to be had to the previous record of the prisoner. What is meant is that that particular provision, like some other provisions of the Act, is one inserted for the protection of the accused. He is not to be sentenced to a term of preventive detention unless the Court thinks it right to pass a sentence of penal servitude in respect of the substantive offence of which he is then convicted or which he admits. In other words, the Court is not entitled to pass a sentence of three years' penal servitude in a case to which that sentence is inappropriate merely for the reason that it is an essential preliminary to passing a sentence of preventive detention.

G. B.

Appeal dismissed.

(*a*) Apparently *J. St. A. Paul*, 18 Cr. A. R. 128: 1924: *prev. det. qu.* Cf. *J. Jones*, 6 Cr. A. R. 1: 1910, and *Coney*, 17 Cr. A. R. 128: 1923: *prev. det. qu.*

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SALTER AND MR. JUSTICE FINLAY.

TIMOTHY HAYES.

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The mere fact that accused has done honest work in his latest interval of liberty is not a defence to the allegation that he is a habitual criminal.

Appeal against sentence and application for leave to appeal against conviction as habitual criminal.

Appellant, who was present, was convicted on June 22nd, 1926, before the Common Serjeant, at the Central Criminal Court, of demanding money with menaces and of being a habitual criminal. On July 2nd, 1926, he was sentenced to four years' penal servitude and five years' preventive detention.

Cassels, K.C., and *Arthur Bryan* for appellant. Appellant was convicted of demanding money from a man by the menace that if the money were not paid within forty-eight hours the man would get a "belting," and that the place where he worked would be "smashed up." Appellant was also convicted of an assault on the same man on the day following the menaces. Appellant admittedly has a bad record. He has been convicted on twenty-seven occasions; since 1908 he has served twenty terms of imprisonment and one of penal servitude. The jury, however, had to decide whether he was persistently leading a dishonest or criminal life at the time he was before them. He came out of prison from his last previous offence on May 2nd, 1926. He committed the present offence on May 17th, but in that interval he worked as a volunteer railway worker during the strike for eight days, and the jury should have been directed that he had exhibited a desire for work inconsistent with the habit of crime.

Frederick Levy for the Crown.

AVORY J.: Counsel suggests that the fact that the appellant did some honest work during the period that he was out of prison

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TIMOTHY HAYES.

Avory J.

should in itself have been sufficient to prevent the jury from finding him to be a habitual criminal. But this Court has said over and over again that the mere fact that a man has done some honest work after he has served the sentence for the offence last before that with which he is now charged, is not by itself a reason why the jury should not find him to be a habitual criminal. The jury have also to look at the character of the man's last offence. If it is committed under sudden temptation—for instance, to avert starvation—the jury may properly regard his endeavour to get honest work as a turning point in his career. In the present case, however, the offences of which the appellant was convicted were deliberate. The Common Serjeant perfectly fairly left it to the jury to say whether the appellant was still persistently leading a dishonest or criminal life, and this Court sees no reason to interfere with the conviction or sentence.

Appeal dismissed.

Solicitor for Appellant—*Geo. Edalji.*

G. B.

WILLIAM EDWARD LOWER.

Severity of sentence.

Appeal against sentence by leave of the Court.

Appellant, who was present, was convicted on June 10th, 1926, before the Chairman at County of London Sessions, of larceny, and was sentenced to three years' detention in a Borstal institution.

No counsel appeared.

The COURT, in view of the fact that appellant's sister had undertaken to receive him into her home and to find him employment, bound him over in his own recognisances in the sum of £10 to go to his sister's house and be of good behaviour and keep the peace for twelve months, and to appear before the Court for judgment within that time if called on to do so.

Sentence reduced.

G. B.

ALBERT JACKSON.

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Avory J.
Salter J.
Finlay J.

Sentence reduced in view of its illegality.

Appeal against sentence.

Appellant, who was present, was convicted on July 6th, 1926, before the Chairman at Oxfordshire Sessions, of attempted shop-breaking, and was sentenced to four years' penal servitude.

No counsel appeared.

The COURT reduced the sentence to one of twenty-one months' imprisonment with hard labour, on the ground that the sentence passed on appellant was illegal, the maximum sentence for an attempt being two years' imprisonment.

Sentence reduced.

G. B.

CHARLES KETTERINGHAM, Senr.

The proper direction on a charge of receiving with guilty knowledge is that if the jury are satisfied that the defendant's explanation is consistent with his innocence they ought to (not may*) acquit, even if they do not accept the explanation given by a witness for the defence.*

Appeal against conviction and sentence.

Appellant, who was present, was convicted on July 12th, 1926, before the Recorder at Norwich City Sessions, of stealing and receiving tinned fish, and was sentenced to twelve months' imprisonment in the second division.

Gerald Howard for appellant. On April 19th, 1926, appellant and his son were charged with stealing and receiving the fish. The son was acquitted, but the jury disagreed with regard to appellant. When appellant was re-tried his defence was that he got the goods from his son and had no knowledge that they had been stolen. The son, in evidence for the defence, said that he had got the goods in the ordinary way of business from a man with a lorry whose name he did not know, and that his father

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knew nothing of the transaction. The recorder misdirected the jury by telling them that if they believed the son's evidence they *could*, not that they *must*, acquit appellant, and he seemed to draw no distinction between the ways in which appellant's explanation and that of his son should be dealt with.

[He was stopped.]

E. Cope Morgan for the Crown. The recorder's summing-up contained an adequate direction on the law. There was sufficient evidence of recent possession by appellant to call on him for an explanation. In these circumstances the Court will at least say that there has been no miscarriage of justice.

AVORY J.: The question which should have been left to the jury was simply: "Did the appellant receive the goods in such circumstances that he must then have known them to have been stolen?" The question, however, which was left was whether the jury thought that the account given by the appellant's son in evidence of the manner in which he became possessed of the goods could be accepted. The jury should have been told not only that they could acquit, but that they ought to acquit, the appellant if they were satisfied that *his* explanation was consistent with his innocence. As it was, the summing-up would appear to convey to the minds of the jury that if they thought that the account given by the son of the way in which he acquired the goods was not reasonable or true they ought to find the appellant guilty. That obviously was misleading and the conviction must be quashed, since we cannot say that, with a proper direction, the jury must inevitably have found the appellant guilty.

Conviction quashed.

Solicitors for Appellant—*J. W. C. Daynes, Son & Keefe*, Norwich.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE FRASER.

WILLIAM KLEIN.

1926
19 *August.*

It cannot be laid down as a general rule that a jury which has acquitted a defendant on one indictment should not try him on another, it must depend on the circumstances of each case; when it occurs, they must be warned that the evidence in the two cases is not cumulative.

Appeal against conviction and sentence.

Appellant was convicted on July 21st, 1926, before the Deputy-Chairman at County of London Sessions, of receiving stolen goods with guilty knowledge, and was sentenced to twenty months' imprisonment with hard labour.

Malcolm Carter for appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present. Immediately before his trial on the charge on which he was convicted, appellant had been tried on another charge by the same jury and had been acquitted. I had to use my discretion. Had I objected to the same jury trying the second indictment, the objection might have been overruled. The position then would have been that after telling the jury that they were unable to come to an unbiassed conclusion in the second case, I should have had to invite from them a verdict in my favour. The Deputy-Chairman said in his summing-up, the evidence against appellant in the second case was weaker than that in the first. It is clear that the jury were biassed by their knowledge of the first case, and their verdict is unsatisfactory.

[He was stopped.]

Bryan for the Crown. Admittedly it would have been more satisfactory if the second charge had been tried by a different jury, but it was open to counsel for the defence to ask for a new jury, and he did not do so. In *Brereton*, 10 Cr. App. R. 201: 1914: c. q., Lord Reading, C.J., said that care must be taken in such a case to warn the jury during the second trial that they must not be prejudiced by their knowledge of a former charge, and in the present case the Deputy-Chairman so directed the

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19 *August.*

WILLIAM KLEIN.

Hewart L.C.J.
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Fraser J.

jury. The whole circumstances of the case were so suspicious against appellant that the jury were justified in convicting him.

The LORD CHIEF JUSTICE: Observations have been properly made on the difficulty in which counsel for the defence is placed when a prisoner is arraigned on a second indictment before a jury which has just tried him on another indictment. No doubt there may be a difficulty, and if the circumstances are such that the same jury should not try both charges, it is clearly a little unfortunate, to say the least, that counsel for the defence, in the presence and hearing of the jury, should be required to ask for a new jury. One can understand that in some cases counsel for the defence, having secured an acquittal on a first charge, might welcome the possibility of an acquittal by the same jury on a second charge, and if with any such purpose he sat still he would not be in a good position to complain afterwards that there was not a different jury to try the second charge. We are assured, however, that that was not the case here.

On the other hand it would be absurd to attempt to lay down the general proposition that in no case must a jury who have tried a man on one charge proceed to try him on another charge. Nor, again, can it be said that, where a jury who have tried a man on one charge ought not presently to have tried him on a second indictment, the mischief is necessarily cured by attention being drawn to it in the summing-up. Each case has to be considered with reference to its particular circumstances, the fundamental fact being that the Crown is interested, not to secure a conviction as such, but only to secure the conviction of the guilty person on admissible evidence, and not on prejudices or suspicion.

In this case the jury acquitted the appellant on the first indictment, and then, on evidence which was weaker against him than that in the first case, they convicted him on the second charge. It seems reasonable to infer that if the second case had been the first to come before the jury they would have acquitted. The cumulative effect of the evidence in the two cases appears to have made up for the weakness of the evidence in each case considered separately. In those circumstances the conviction is unsatisfactory and must be quashed.

Conviction quashed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

JOHN HASLAM.

1926
18 *October.*

If the court is of opinion that there is no case against a defendant, it ought to be withdrawn from the jury.

Appeal against conviction and sentence.

Appellant was convicted, on September 2nd, 1926, before the Chairman, at Lancashire Sessions, of office breaking, and was sentenced to six months' imprisonment with hard labour.

Alexander Cairns for appellant (who was present), under s. 10 of the Criminal Appeal Act, 1907. Appellant was one of three prisoners who were charged with breaking and entering the office of a farmer, near whose farm they were working, and stealing therefrom a safe, ten shillings in money, ledgers, documents, and other articles. There was no evidence to go to the jury against appellant, and the case against him should have been withdrawn, but, although the Chairman fully appreciated the weakness of the case for the prosecution, and, indeed, said several times in the course of his summing up that there was no evidence against appellant, he allowed the case against him to go to the jury, with the result that appellant was convicted as well as the other prisoners.

[He was stopped.]

Rice-Jones for the Crown. There was some evidence to go to the jury against appellant, although it was purely circumstantial and consisted of an accumulation of small details, none of which was very important in itself.

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18 *October.*

JOHN HASLAM.

Hewart L.C.J.

The LORD CHIEF JUSTICE stated the facts and continued: It does not appear to the Court that it is safe or prudent that this conviction should stand, and this appeal is accordingly allowed and the conviction quashed.

Conviction quashed.

G. B.

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25 *October*

PATRICK FITZGERALD.

Proviso to s. 4 (1) *of the Criminal Appeal Act*, 1907, *applied.*

Appeal against conviction by leave of the Court.

Appellant was convicted, on August 26th, 1926, before the Acting Deputy-Chairman, at the County of London Sessions, of receiving stolen goods and of assaulting a police officer in the execution of his duty. Sentence upon him was postponed.

Venetia Stephenson for appellant. Appellant was convicted, with a man named Philpot, of having knowingly received stolen property. On July 28th, 1926, certain premises in Stamford Street, London, were broken into, and property worth between £500 and £600 was stolen. On August 3rd a police officer found some of the stolen property at the coffee shop of one Chesman, who was arrested. On the same day a police sergeant saw appellant and told him that he answered the description of a man who was "wanted" in connexion with the theft. He said at first: "I know nothing at all about it." Later he said: "I admit I was with them and I do not mind going to the station." When the officer, however, caught hold of his arm appellant struck him in the face and ran away. Later, he was arrested and was identified by Chesman as one of the men who had taken the stolen property to his shop. The proceedings against Chesman were dropped, and he was called as a witness for the prosecution at the police court and also at the Sessions. It is submitted that there was no evidence to go to the jury that appellant was

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PATRICK FITZGERALD.

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ever in possession of the stolen goods. Joint possession must not be presumed: *Flatman,* 8 Cr. App. R. 256; 14 Cox, C. C. 396; 42 L. T. 159; 44 J. P. 314: 1913: c. q. To convict a prisoner of receiving stolen property there must be clear evidence of possession by him: *Annie Lewis,* 4 Cr. App. R. 96: 1910: c. q. An omission to direct the jury on the law relating to these matters may amount to a miscarriage of justice: *Flatman,* above; *George Watson,* 1916, 2 K. B. 385; 85 L. J. K. B. 1142; 115 L. T. 159; 80 J. P. 391; 32 T. L. R. 580; 12 Cr. App. R. 62: c. q. Here the jury were never directed that it was for them to say whether there was evidence of possession by appellant; the Chairman found that there was as a matter of law. Furthermore, Chesman should have been treated as an accomplice, but he was not, and the summing up contained no word regarding the need of corroboration of his evidence, nor of what corroboration consists.

Lucy for the Crown. There was no evidence that Chesman was an accomplice, and no need for him to be so treated. Apart from his evidence there was sufficient evidence to go before the jury.

The LORD CHIEF JUSTICE: Reliance has been placed on behalf of the appellant on the weakness of the evidence against the appellant and the inadequacy of the summing up. It is to be regretted that the jury were not clearly directed on the meaning of "possession" in receiving cases, and the importance of being satisfied that there was joint possession by the appellant and Philpot; on what an accomplice is; the danger of convicting on the uncorroborated evidence of an accomplice; and what are the necessary elements of corroboration. But, on the other hand, two facts at least emerge from the evidence—(a) that the appellant, after denying knowledge of the matter to the police officer, went on to say: "I admit I was with them," *i.e.*, the men who broke into the premises in Stamford Street; (b) that within a few days afterwards, on his own testimony, he went with Philpot to collect the money for the property. In all the circumstances, we are of opinion that with a perfectly proper summing up the jury must inevitably have come to the conclusion that the appellant

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was guilty, and that, therefore, there has been no miscarriage of justice. This appeal is, accordingly, dismissed.

Appeal dismissed.

Solicitors for Appellant—*H. M. Meyler & Co.*

G. B.

GRACE REBECCA FISHER.

On the trial of an indictment for larceny by a trick, the essential elements of that offence should be explained to the jury, and if the facts of the case point to an obtaining by false pretences, the difference between the two offences must be made clear to them in view of a possible verdict of guilty of the latter.

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted, on August 24th, 1926, before the Deputy-Chairman, at the County of London Sessions, of larceny, and was sentenced to six months' imprisonment in the second division.

C. E. G. C. Emmott for appellant (who was present), under s. 10 of the Criminal Appeal Act, 1907. Appellant could not have been properly convicted of larceny on the evidence, which was that she obtained from the prosecutrix, a ladies' and children's outfitter, certain garments on sale (if she found that they fitted her) or return, and that within a very short time she pawned the clothes but failed to pay the prosecutrix for them. The pledging of the clothes by appellant was an "act adopting the transaction" within s. 18, rule 4 (a) of the Sale of Goods Act, 1893, and the property in the goods thereupon passed to appellant, and she became entitled to deal with them. Appellant might have been convicted of obtaining the goods by fraud if she could be shown to have acted throughout with fraudulent intent: *Whitehorn Bros.* v. *Davison*, 1911, 1 K. B. 463; 80 L. J. K. B. 425; 104 L. T. 234; *J. Parkes*, 2 East, P. C. 671; 2 Leach, C. C. 614: 1794: conviction held to be wrong; *Prince*, 1 C. C. R.

150; 38 L. J. M. C. 11; 19 L. T. 364; 17 W. R. 179; 11 Cox, C. C. 193: 1868: c. q.: but the summing up contained no direction of what were the elements necessary to constitute either larceny by a trick or false pretences.

SALTER J. referred to *Oppenheimer* v. *Fraser*, 1907, 2 K. B. 50; 76 L. J. K. B. 806; 97 L. T. 3; 23 T. L. R. 410; 12 Com. Cas. 289: and the LORD CHIEF JUSTICE referred to *A. Hilliard*, 1913, 83 L. J. K. B. 439; 109 L. T. 750; 23 Cox, C. C. 617; 9 Cr. App. R. 171: c. q.

Frederick Sharp for the Crown. There was evidence of larceny to go to the jury, and the summing up, if short, was adequate. As Bankes L.J. said in *Lake* v. *Simmons*, 1926, 2 K. B. at p. 63, "The woman in question had a guilty mind at the moment she obtained possession of the articles. She was rightly, therefore, held guilty of larceny by a trick."

G. B.

The LORD CHIEF JUSTICE (*a*): This appellant, Grace Rebecca Fisher, was convicted, at the County of London Sessions, of stealing a coat and some other articles of clothing, the property of one Emily Cox. In the result she was sentenced to six months' imprisonment in the second division, and now, by leave of the Court, appeals against both conviction and sentence. There were, in fact, three different sets of counts in the indictment, counts for stealing and receiving on three different occasions. It was held that there was no case against the appellant upon two of those counts, and on those counts she was acquitted, but she was convicted on the third count of stealing from Emily Cox.

The evidence was that on the 6th day of July the appellant went to the shop of Emily Cox at Blackheath and saw a jumper and a jumper suit and some other articles of clothing, the price of which was £3 9*s*. 5*d*., and asked if she could have the goods on approval to try the things on at home and match them with other clothes which she had, and she said she would pay for them the

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Director of Public Prosecutions.

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GRACE REBECCA FISHER.

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next day. She gave an address, 2 Lindsey Villas, and she was allowed to take the goods away; she never returned, nor did she pay for them. On the 7th July Emily Cox went to Lindsey Villas, but the appellant was not there, in fact, on the 6th July, the very day on which she got the goods, the appellant pawned the suit for 5*s.* with one pawnbroker, and on the 7th July she pawned the coat for 2*s.* 6*d.*, and on the 8th July the remaining articles she pawned for 8*s.* with other pawnbrokers. She was arrested on the 30th July, and she was charged with stealing from Mrs. Cox. She said: "All right, I will come with you; I know where the stuff is; I have my defence." At the trial she gave evidence that she was a commercial traveller on commission, and said that she was employed for various firms, two of which she mentioned, and others she did not, and she said that she got the goods from Mrs. Cox to be returned as soon as she could return them, or to be paid for as soon as she got her money in. She said that she had not sufficient money then, and she went on to say that she pawned these articles because she was suddenly turned out of her lodgings. She denied that she pawned anything on the 6th July. The first of the pawnbrokers had said at the police court that the suit had been pawned with him on the 12th July, but at the trial he said that he had made a mistake, and it had in fact been pawned on the 6th July. There, then, were the two stories, and the case for the appellant clearly was that she intended to pay for the goods; that she did not at first intend to pawn them, but she pawned them because she was suddenly and unexpectedly turned out of her lodgings. In those circumstances it became the duty of the Court to explain very clearly to the jury what are the essential ingredients of larceny. The charge here is larceny and nothing else, and the difference between it and obtaining goods by false pretences is, no doubt, not quite an easy matter, but it is essential, therefore, that it should be explained to the jury, and that the minds of the jury should be directed to the true criteria.

As was said by this Court in a case dealing to some extent with the same subject-matter, *The King* v. *Hilliard* [above]: "We think that this case could not properly be left to the jury without a direction on the law, and the difficulty we feel is that the Chairman does not appear to have had the precise point of law clearly in his mind, and did not call the attention of the jury

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specially to that point, so that they could apply their own minds to it. We cannot say for certain that if the jury had been properly directed they would have found the same verdict."

The whole of the summing up in this case has been read. It fills a page of the transcript of the shorthand notes, it has undoubtedly the great merit of brevity, but unfortunately it seems to us not sufficiently to explain to the jury what larceny by a trick is, and what is the difference between that and obtaining goods by false pretences. It is possible that if a proper direction had been given, the jury in this case might have convicted the appellant of obtaining these goods by false pretences, but it is by no means certain. In the result, therefore, our decision is that this conviction cannot stand, and as it is not clear that upon a proper direction the jury would have convicted, as they might have done, of obtaining these goods by false pretences, we do not think it would be right for us to substitute that verdict. In the result, therefore, this appeal is allowed, and the conviction is quashed.

Conviction quashed.

PERCY VICTOR KNELL.

8 *November.*

Severity of sentence.

The fact that a convicted prisoner has undergone terms of penal servitude does not of itself justify sentence to a further term: all the circumstances of the case must be considered, including the magnitude of the latest offence.

Appeal against sentence by leave of the Court.

Appellant was convicted, on September 25th, 1926, before the Chairman, at Middlesex Sessions, of larceny, and was sentenced to four years' penal servitude.

H. C. Bickmore for the appellant (who was present), under s. 10 of the Criminal Appeal Act, 1907. Appellant was sentenced to four years' penal servitude for stealing a rug and lady's "companion set" of the value of 40*s*. from a garage. The sentence was too severe for such an offence.

[He was stopped.]

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8 *November.*

PERCY VICTOR KNELL.

Hewart L.C.J.
Avory J.
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Ronald Powell for the Crown. Appellant had a very bad record and had been convicted many times. This was taken into consideration by the Court in passing sentence. It is admitted that he had done a little *bonâ fide* insurance work since he last came out of prison.

The LORD CHIEF JUSTICE: The facts of the case are that, while a chauffeur was having tea in his cottage, the appellant entered an adjoining garage and stole a rug and a lady's "companion set," the value of the two things taken together being said to be 40*s*. The chauffeur, on coming out of his cottage, saw the appellant leaving the garage, and the appellant then ran away. He was followed, stopped, and handed over to the police. They later found the stolen articles, which had been thrown away. No question arises on this appeal regarding the conviction, but a question does arise regarding the sentence. It appears from the shorthand note that the Chairman at first passed a sentence of six years' penal servitude. The appellant then said: "You surely will not pass such a sentence for this offence." The Chairman then reduced the sentence to four years' penal servitude, and from that sentence the appellant now appeals. It is true that the appellant has a bad record. He is now forty-seven years of age, and in 1901, when he was twenty-two years of age, he was sentenced to three years' penal servitude for his first offence. The sentences which were passed in those days were very different from those passed now. He was next sentenced in 1904, and again in 1908 after an interval of four years. In 1913 he received a term of penal servitude, and in 1923 and 1925 he received terms of imprisonment. It has been said again and again in this Court that the mere fact that a man has committed serious offences and suffered long terms of detention in respect of them is not in itself a reason for imposing a sentence of a long term afterwards because of the previous sentences when the offence charged is a minor offence. Three things appear in the present case. Since the appellant came out of prison for the last offence he has been doing some honest work. It also appears that from time to time on coming out of prison the appellant tried to reform. And, further, it seems that for a month before committing this offence he had been ill. In the opinion of this Court a sentence of four years' penal servitude is disproportionate to the offence, and we

reduce it to a sentence of twelve months' imprisonment with hard labour. As leave to appeal was given the sentence will run from September 25th, when the sentence was passed.

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Sentence reduced.

G. B.

REGINALD GEORGE TURNER.

A statement relative to a pending charge, obtained in the course of a question addressed by a police officer to a person under arrest on that charge, is not a voluntary statement.

Such a statement is not evidence against a co-defendant, but if the jury have been adequately warned on that point the Court will not interfere on the ground of an ambiguous sentence in the summing up.

Appeal against conviction and sentence.

Appellant was convicted, with Edith Mann and another person, at the Buckinghamshire Quarter Sessions, on October 11th, on two counts, one for breaking into an office and larceny, and one for attempting to break into a garage, and was sentenced by the Deputy-Chairman to three years' penal servitude.

G. St. J. Macdonald for the appellant, who was present.

C. K. Tatham for the Crown.

The LORD CHIEF JUSTICE, having dealt with the evidence, continued:—

Now there was the evidence—apart from a statement which was made by Edith Mann. Much has been said to-day concerning that statement. On the 6th July Superintendent Callaway saw her in the police station at Winslow. He cautioned her and showed her the stamps which had been found upon Turner. She then made some remarks and the superintendent again cautioned her. She desired to make a statement in the presence of the other two prisoners, but the superintendent preferred to take a statement from her and reduce it to writing, and then to serve a copy of

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REGINALD GEORGE TURNER.

Hewart L.C.J.

that statement upon the other two prisoners. It is enough to say of that statement, which has been read, that it was a statement of a completely incriminating character. Further, with reference to that statement two police officers gave evidence that after the remand they heard the appellant say in the cells, and across a cell, to Edith Mann: "You ought not to have made that statement; I told you what to say yesterday morning. We shall have to put up with it; we should have got off this morning if it had not been for that."

It is urged, first of all, that this statement was improperly obtained from the woman, Edith Mann, and that it was improperly treated as being evidence, not only against her, but also against each of the other two prisoners. Reference has been made, and it is useful to make reference, to the case of *Grayson*, reported in 16 Cr. App. R. 7 [1921: c. q.], where this is said at p. 8 in the clearest terms: "The police had no right to examine Grayson or to invite statements against him from other persons in custody whose sole aim was to throw blame on the appellant." There is certainly evidence in this case to indicate that the woman, Edith Mann, far from proferring a voluntary statement, was sent for by the superintendent of police in order that he might question her, as he said, upon other matters with reference to other offences. It is quite clear, further, from his own evidence that he put before her the postage stamps found upon Turner, undoubtedly with the effect of inviting a statement from her, and that, having got a statement in that way, he served it upon the other two prisoners. Nothing which is said here to-day must be taken as indicating approval of that course. But when one comes to the further question, whether in this trial that statement was improperly used as against the present appellant, it seems clear that the reasons offered on behalf of the Crown are sufficient. There is a passage which at first blush appears unfortunate, on p. 63 of the summing up, where this is said: "That is the evidence against the three as regards Guildford, except that the female, Mann, signed the statement at the Winslow police station on the 7th July." It is argued that that statement must mean that the statement so signed by her was evidence against the three. But, as is pointed out, that is by no means the necessary meaning of the sentence: it might equally well mean that with regard to Edith Mann herself there was against her, as distinguished from the

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three, the evidence contained in her statement. And again at p. 64 the jury are told this: "You are not to take into account the fact that Mann made the statement that Turner was there." Undoubtedly if that observation stood by itself, it is not by any means a sufficient warning that the statement made by Edith Mann in the absence of Turner is not evidence against Turner. But it is common ground that in the speeches of the learned counsel the question of the effect of this statement had been fully placed before the jury: for the learned counsel for the defence protested that it could not be evidence against Turner and the learned counsel for the Crown stated that it was not being used at all as evidence against Turner. The effect, therefore, of the observation in the summing up is as if the learned Chairman had said: "What has been said about this statement is quite right: it is not evidence against Turner at all."

In these circumstances it does not seem possible to contend that there has been in this case an insufficient direction upon the effect of Edith Mann's statement so far as this appellant is concerned. Even if it had been otherwise, when one looks at the rest of the evidence, and, in particular, the evidence of the marks of the car, the evidence of the possession of the perforated stamps, the evidence of the chisel, coupled with the fact that the defence of Turner was a complete *alibi*, it would not be possible to say that here there has been any miscarriage of justice. The judgment of the Court is not based upon that ground. The judgment of the Court is based upon the ground that when this summing up is fairly regarded as a whole, in relation to what had *then* been urged before the jury, it is a sufficient direction. I only say alternatively, even if that had not been the case, there was abundant material here upon which the jury must certainly have arrived at the same conclusion.

It is said that the sentence passed is excessive, and is also in an improper or defective form. When one looks at the previous record of this appellant it is idle to say that this sentence is excessive. In regard to the form, it is a sentence proper to be passed upon the first count of the indictment. The indictment is before the Court, and all that it says is three years' penal servitude. That might be read, as it has been sought to read it, as three years' sentence upon Turner upon each of the counts of the indictment. That, of course, would be wrong, and the

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8 *November.*

REGINALD GEORGE TURNER.

Hewart L.C.J.

sentence, therefore, is in form amended to this: three years' penal servitude upon the first count, six months' imprisonment with hard labour upon the second count, to run concurrently.

Appeal dismissed.

Solicitor for Appellant—*Bruce Searl.*

H. C.

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9 *November.*

FREDERICK BASIRE.

Severity of sentence.

There is no rule of law or practice that the term of a first sentence of penal servitude is limited to three years.

Appeal against sentence.

Appellant was convicted, on October 13th, 1926, before the Recorder, at the Central Criminal Court, of larceny, as an officer of the Post Office, and was sentenced to four years' penal servitude.

H. A. Hill for appellant (who was present). Appellant, a porter at the East Central District Post Office, pleaded guilty to an indictment charging him in three counts with the theft over a period of eighteen months of postal packets which were in course of transmission by post. In the course of his duties he, with other men, had access to the mail bags which contained registered letters. Losses of letters occurred, appellant and other men were watched, and on September 4th, 1926, appellant was observed as he was cutting open a bag containing registered letters. He was detained and interviewed by a clerk of the Investigation Branch of the Post Office, and he confessed to thefts on three dates which were made the subject of the charges in the indictment. He also admitted having stolen a large number of other postal packets, having kept such articles as were of value to him and having thrown the others down a drain. He asked that the other cases should be taken into consideration, but he denied having had any knowledge of a pearl necklace worth £400, which the prosecution said was among the articles which were thrown away. The Recorder, however, would seem to have taken that matter into account adversely to appellant in passing sen-

tence. But apart from that the sentence was too severe. Appellant had previously borne a perfectly good character, and he made a full confession of all his offences voluntarily. The Court, it is submitted, inclines against a sentence of more than three years for a first term of penal servitude: *M. Myers*, 11 Cr. App. R. 115: s. r.; *W. Jones*, 13 Cr. App. R. 212: s. r. (1915 and 1918).

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FREDERICK BASIRE.

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Avory J.
Salter J.

The LORD CHIEF JUSTICE: The total value of what the appellant stole, as far as can be ascertained, was £397. Language has been used which suggests that there are fixed rules about these sentences, and in particular a fixed rule about the length of a first term of penal servitude. If that view is really entertained it is erroneous. Not very long ago a post office servant was sentenced to five years' penal servitude at least for any act of dishonesty in the course of his work. That rule has ceased to exist, but no rule has taken its place which says that in no circumstances can a post office servant be sent to penal servitude for the first batch of his offences which come to light, or that, if he is so sent to penal servitude, his sentence may not exceed three years. Regarding all the circumstances of this case—the number of cases involved, the nature of the evidence, the fact that the appellant again and again deliberately stole, not letters put into his hands for delivery, but registered letters from bags which he had cut open for the purpose—and regarding also the present frequency of thefts of various kinds from letters and bags of letters in the course of transmission through the post, the Court think that this sentence ought to stand.

Appeal dismissed.

Solicitors for Appellant—*Kenneth Brown, Baker, Baker.*

G. B.

ROGER O'MORE.

15 *November.*

Severity of sentence in view of previous convictions.

Appeal against sentence.

Appellant was convicted on October 11th, 1926, before the Recorder at Bristol City Sessions, of larceny, and was sentenced to five years' penal servitude.

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15 *November.*

ROGER O'MORE.

Hewart L.C.J.
Avory J.
Salter J.

E. A. Hawke for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was convicted of the larceny from a railway station of a hospital collecting-box containing between 8*s.* and 10*s.* Admittedly he had been convicted on a number of previous occasions, but "a heavy sentence should not be passed for a minor offence merely because the prisoner has previously committed serious offences." (*Per* Lord Hewart C.J., in *Maxwell*, 18 Cr. App. R. 13: 1924: sent. red.) It is submitted that it is clear that the Recorder was induced to pass the sentence which he did by appellant's record.

Further, no evidence was given to prove the appellant's previous convictions. Some of them he admitted, but ten of them he did not admit. As no one was called to prove them, the appellant had no opportunity of cross-examining with regard to those convictions which he did not admit.

The Crown was not represented by counsel.

The LORD CHIEF JUSTICE: The appellant is sixty-two years of age, and against him there is a most formidable list of convictions. It does not appear clearly from the transcript of the shorthand note which of those convictions he admitted in the Court below and which he denied. As was said in *Turner,* 18 Cr. App. R. 161: 1924 (sent. red.), "It cannot too clearly be understood that where previous convictions are relied on for any purpose in a trial they must be either (a) proved by lawful evidence, or (b) expressly admitted by the accused person." We assume that the Recorder, in passing sentence, did not take into account any consideration based on any previous conviction which the appellant did not admit. But the fact remains that this sentence, passed in respect of the theft of 8*s.* to 10*s.*, was disproportionate to the offence, and we reduce it to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE MACKINNON.

TREVOR WILLIAMS.

1926
29 *November.*

Severity of sentence, after previous convictions.

Appeal against sentence by leave of the Court.

Appellant was convicted on October 20th, 1926, before the Chairman at Monmouthshire Sessions, of obtaining goods by false pretences, and was sentenced to five years' penal servitude and three years' police supervision.

Appellant in person.

The Crown was not represented by counsel.

THE LORD CHIEF JUSTICE: The appellant was released from Parkhurst Prison (where he had been serving a sentence) on August 18th, 1926. In the course of the next fortnight, by various false pretences, he obtained in three different places money, food and lodging, obviously without any intention of making payment or repayment. The materials before us make it clear that at the quarter sessions he pleaded guilty to all the three charges without reservation. The sums of money concerned were very small, and we think that this sentence of three years' penal servitude calls for revision. The appellant, although he is only thirty-one years of age, has a record, between 1912 and 1926, of many terms of imprisonment and two terms of penal servitude. Looking at all the circumstances of the case, we think that the right course is to reduce this sentence to one of fifteen months' imprisonment with hard labour.

Sentence reduced.

G. B.

1926
29 *November.*

Hewart L.C.J.
Salter J.
Mackinnon J.

CHARLES CADWALLADER.

Mitigation of sentence in view of previous good character.

Appeal against sentence by leave of the Court.

Appellant was convicted on October 21st, 1926, before Swift J., at Worcester Assizes, of larceny from a mail bag, and was sentenced to three years' penal servitude.

A. F. Clements for appellant. Appellant was guard of a train from Tenbury Wells to Kidderminster on July 23rd, 1926. That train carried a mail bag containing a test letter made up by Post Office officials, in which were two £1 notes. When the train arrived at Kidderminster it was found that a hole had been cut in the bag, and that the test letter and others had been removed. Appellant at first denied any knowledge of the matter, but when two £1 notes in his possession were identified as those which had been placed in the test letter he admitted cutting the hole in the bag, taking the test letter and the other letters from it, destroying the letters and keeping the £2. He also admitted that he had taken other letters on various occasions, but he emphatically denied ever having taken any registered letter, or having cut holes in mail bags on any other day. It was stated at the trial that letters had been disappearing from mail bags on that section of railway since 1921, and that £89 had been stolen from registered letters. It is submitted that, in passing such a severe sentence on appellant, the judge at the trial based it in some measure on a supposition that appellant had taken some registered letters. Appellant has been in the service of the Great Western Railway for thirty-nine years, and he has always borne an excellent character. His father was forty years in the service of the railway. The amount of money actually proved to have been stolen was very small.

The Crown was not represented by counsel.

The Lord Chief Justice, after stating the facts, said: We have been told that it was consistent with the evidence that the offences which the appellant admitted were committed within a very short time, and that he has been a guard on this railway since 1897. Regard being had to all the circumstances of this

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CHARLES CADWALLADER.

Hewart L.C.J.

case—not least to the length of the appellant's service, and to the possibility of there having been misapprehension regarding the period over which his offences extended, and especially to the unblemished character which he had borne so long—we think that this sentence should be reduced to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

G. B.

Solicitors for Appellant—*A. D. Capel Loft & Son.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE TALBOT.

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13 *December.*

MICHAEL HOGAN.
JOSEPH HOGAN.

Conviction quashed on the ground of insufficiency of evidence.

Appeal against conviction on reference by the Home Secretary.

Appellants were convicted on September 2nd, 1926, before the Chairman at Lancashire (Preston) Sessions, of office-breaking, and were each sentenced to six months' imprisonment with hard labour.

Appellants were not present, and were not represented by counsel.

G. B. McClure, for the Crown, said that he appeared to assist the Court if needed. but, in view of *John Haslam* (above, p. 163), not to argue.

The LORD CHIEF JUSTICE: The appellants were convicted with one John Haslam of breaking and entering an office and stealing a safe. On September 6th, all three applied for leave to appeal against their convictions and sentences, but on September 16th

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MICHAEL HOGAN.
JOSEPH HOGAN.

Hewart L.C.J.

the two appellants abandoned their appeals. On October 4th, the judge granted Haslam leave to appeal, and on October 18th this Court quashed his conviction on the ground, in effect, that there was no evidence to support it. On October 20th, the appellants petitioned the Home Secretary, and on November 27th he referred the cases to this Court under s. 19 (a) of the Criminal Appeal Act, 1907. By Rule 48 of the Criminal Appeal Rules, the appellants are in the same position as that in which they would have been if they had obtained leave to appeal from this Court. It is not attempted to support these convictions, and it only remains to mention (a) that the jury convicted in the very teeth of the summing-up, in which the Chairman expressed the opinion that the appellants ought not to be convicted; and (b) that a statement by the appellants that they would not have abandoned their appeals if they had not been told that a great lapse of time would occur before the appeals would be heard—a statement entirely without foundation. Appeals to this Court are speedily heard, and, as the result of a Home Office inquiry, we are informed that no prison officer told either of the appellants that they would have to wait for a long time. These convictions are quashed.

Convictions quashed.

G. B.

JOHN KYNASTON.

Conviction quashed on the ground of a mistake in law.

Appeal against conviction.

Appellant was convicted on November 15th, 1926, before the Common Serjeant at the Central Criminal Court, of aiding an offence under 15 & 16 Geo. 5, c. 74 (the Dangerous Drugs Act, 1925), and was ordered to pay a fine of 10*l*.

Appellant, who was not in custody, in person.

It is unnecessary to set forth his argument in support of quashing his conviction in view of the fact that

H. D. Roome for the Crown, at the close of the appellant's case, drew the attention of the Court to s. 7, sub-s. (3), of the

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13 *December.*

JOHN KYNASTON.

Hewart L.C.J.
Salter J.
Talbot J.

Dangerous Drugs Act, 1925—the Act under which the appellant had been indicted and convicted—and said that he had just been instructed that no Order in Council bringing the Act into force had been made.

The LORD CHIEF JUSTICE: This appeal has no real merits, but we are compelled to quash this conviction. By one of those devices referred to in that phrase of Hallam's which tells us that we must venerate that which we cannot presently comprehend in the Constitution, the Dangerous Drugs Act, 1925, by s. 7, sub-s. (3), provides that the Act "shall come into operation on such date as his Majesty may by Order in Council appoint. . . ." There has been no Order in Council and the Act has, therefore, not come into force. This prosecution was conducted on the assumption that it had. It thus resembles nothing so much as pulling a bell-handle without a bell at the other end.

Conviction quashed.

G. B.

FREDERICK HITCHCOCK.

20 *December.*

Conviction quashed on the ground of unsatisfactory identification.

Appeal against conviction.

Appellant was convicted on November 23rd, 1926, before the Chairman at the County of London Sessions, of larceny in a dwelling-house, and was sentenced to fifteen months' imprisonment with hard labour.

R. E. Seaton for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present, was not called on to argue.

The facts appear sufficiently from the judgment.

Arthur S. May for the Crown. It is true that at the trial the evidence of identity was solely that of the prosecutor, but the jury accepted it without hesitation, and in their verdict laid stress on having done so.

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20 *December*.

FREDERICK HITCHCOCK.

Hewart L.C.J.

The LORD CHIEF JUSTICE: The appellant was convicted of stealing £50 in notes from the house of John Krell, a greengrocer, who carried on business in Notting Dale. His evidence was that on the evening of November 13th, 1926, between 7 and 8 o'clock, he became suspicious of a man who was walking up and down on the pavement opposite the shop, and he went to shut the side door. As he returned he saw a man coming down the stairs backwards, and asked him what he was doing. He said that he then saw the front of the man in the light from the kitchen and from the shop. The man said that he wanted a certain bookmaker, and Krell said that there were no bookmakers there. The man went away, and Krell went upstairs and found that the money had been taken out of the wardrobe. He went to the police and gave them a description of the man whom he had seen. Just before midnight the appellant was arrested about 100 yards from Krell's shop. Afterwards he was placed with eleven other persons, and was picked out by Krell.

At the trial the appellant gave and called evidence in support of an *alibi*. He was not defended by counsel. If he had been, one cannot help feeling that some attempt would have been made to ascertain more precisely the time of the alleged offence. As the matter stands it appears to have been left vaguely as between 7 p.m. and 8 p.m.

The identification of the appellant was, in our opinion, quite unsatisfactory, and it would not be safe to uphold this conviction. It is just to add that the summing-up was most fair, and, reading between its lines, one can see quite plainly that the Chairman was in great doubt whether there should be a conviction; a doubt from which, on thinking the matter over, he has not receded. This appeal is therefore allowed.

Conviction quashed.

G. B.

The Court (The Lord Chief Justice, Horridge and Salter JJ.) also sat on December 21st.

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